SUPREME COURT, U. S.

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Supreme Court of the United States

OCTOBER TERM 1962

No. 735

NORTH TEXAS PRODUCERS ASSOCIATION,
Petitioner,

versus

KEITH YOUNG,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

North Texas Producers Association, your petitioner, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above case on September 13, 1962.

OPINIONS BELOW

The Opinion of the Court of Appeals (*infra*, Appendix A, page 19) is reported at 308 F. 2d 235 (5th Cir., 1962). The per curiam Opinion denying rehearing is unreported.

JURISDICTION

The Judgment of the Court of Appeals was entered on the 13th day of September, 1962 (*infra*, Appendix B, page 43). A Petition for Rehearing duly filed was de-

nied on October 17, 1962 (*infra*, Appendix C, page 47). The jurisdiction of this Court is invoked under the provisions of 28 U.S.C.A., Section 1254(1).

QUESTIONS PRESENTED

Point I.

(1) Where a milk cooperative controlling most of the milk in the Dallas area is charged with conspiracy to breach a contract to deliver **bottled milk** to plaintiff, is it a defense to a Sherman Act treble damage suit that:

(a) Defendant bottled for no other customer; and

(b) Defendant was at all times ready, willing and able to deliver milk in bulk to plaintiff on the same terms and conditions as defendant delivered **to each and every other customer**; and

(c) Defendant did **so deliver** bulk milk to plaintiff during the period for which damages were allowed; and

(d) The bottling contract breached, if carried out, would plainly have constituted a subsidy in favor of plaintiff over and against every other customer of defendant.

(2) Whether under the foregoing set of facts, plaintiff's sole remedy is not an action for breach of contract in the State Court, which action is presently pending.

(3) Whether an alleged monopolist should be held liable for treble damages for conspiracy to refuse to give one customer preferential treatment over another.

Point II.

(4) In a suit involving alleged damages for breach of a contract to bottle milk, where plaintiff claimed as damages the difference between the contract cost and his **actual** bottling cost, whether he is relieved from showing his actual bottling costs merely by virtue of defendant's alleged violation of the Sherman Law.

(5) Whether a plaintiff in a treble damage suit is relieved from proving his damages reliably, when this was clearly within his power, by virtue of defendant's alleged violation of the Sherman Law.

Point III.

(6) Whether it was not highly prejudicial in attempting to show plaintiff's actual bottling costs in Dallas, Texas, to admit evidence as to the cost of obtaining bottled milk from Kansas City, Missouri, although no milk was ever bought from Kansas City.

Point IV.

(7) Whether damages for conspiracy to breach a contract terminable at the end of any six months' period should be computed for a longer period than the six months for which defendant was bound.

STATUTE INVOLVED

The statute involved is set out in Appendix D (*infra*, pages 51, 52), being Sections 1, 2 and 15 of the Sherman Act.

STATEMENT

On July 13, 1956, defendant entered into a contract (R. 135, *et seq.*), whereby defendant was to sell **bottled milk** to plaintiff. Defendant is a Texas corporation, a

cooperative milk association consisting of about 2,500 farmers organized and doing business under the laws of Texas. It controlled about 85% of the raw milk in the Dallas area. Plaintiff is an individual living in Texas.

It is not clear when the contract was to become effective, since it has no stipulation in this regard. In any event, both parties proceeded to make preparation for its execution. Defendant purchased about $20,000.00 worth of equipment for bottling and plaintiff purchased a truck and made inquiries regarding permits, sales routes, etc. On October 15, 1956, plaintiff caused to be created a corporation known as Jere Dairy, Inc., which corporation was controlled by him and his family, all as contemplated in the basic contract between defendant and plaintiff (R. 141). Shortly after November 3, 1956, when plaintiff claimed he was advised by defendant that it would not go forward with the bottling contract, plaintiff made arrangements to go into the bottling business himself through the corporation already in existence (R. 264). He leased the necessary quarters, remodeled it for a bottling plant, bought equipment and took the other necessary steps to pasteurize and bottle milk in glass gallon containers for sale to the public in the Dallas-Fort Worth area (R. 264, 268, 269, 270). This business was opened on April 26, 1957 (R. 270), and since that time plaintiff has been in complete charge of this highly successful bottling business (R. 271). As of the time of trial, about four years later, he was selling over a million pounds of raw milk per month (R. 359). In setting up these operations, plaintiff had, at all times, the full cooperation of the defendant, who assisted plaintiff in setting up his processing plant, recommended the plant site, sold plaintiff raw milk in bulk on the same terms and conditions as defendant sold to every other handler (R. 359, 360, 361, 482, 483, 486).

On January 21, 1957, plaintiff filed suit against this same defendant in the State Court in Dallas, alleging breach of the bottling contract and claiming $12,000.00 consisting of $10,000.00 damages for breach of contract and return of a $2,000.00 deposit (R. 378 *et seq.*). On December 2, 1958, the instant suit was filed, alleging for the first time a conspiracy to breach the same contract and claiming a Sherman Act violation (R. 1). Plaintiff's theory for the present suit is that defendant's alleged breach of contract was the result of pressure from other milk handlers in the Dallas area who agreed on November 2, 1956 to a voluntary price increase of about one cent a quart in favor of defendant, conditioned on defendant's refusal to bottle milk for plaintiff (R. 122). Defendant denied the existence of any such conspiracy and claimed that the price increase was wholly coincidental, being necessitated by a severe drought which had caused serious financial setbacks to the farmers composing defendant association. The existence of the drought was not denied but the jury found the conspiracy to have existed and the existence of the conspiracy is assumed for purposes of this petition as it was in the Court of Appeals. The jury awarded plaintiff damages in the amount of $100,000.00, which were trebled by the Court, to which were added attorneys' fees and judgment with interest was rendered accordingly. From this judgment, North Texas appealed unsuccessfully to the United States Court of Appeals for the Fifth Circuit, and now prosecutes this application for Writ of Certiorari.

ARGUMENT

I.

There Has Been No Violation of the Sherman Law

Defendant urged below in both Courts, and urges here, that the breach of its contract to bottle milk for plaintiff did not give rise to an action under the Sherman Law, but merely to an action for simple breach of contract, which action by plaintiff is presently pending in the State Court. In support of this argument, defendant submits the following:

Defendant alleged monopolist contracted to bottle milk for plaintiff at 60¢ per hundred weight. Defendant bottled for no other customer. On protest from defendant's other customers, defendant refused to carry out its contract to bottle for plaintiff. It was still ready to deliver milk in bulk to plaintiff on the same terms and conditions as to other customers (and did so in fact deliver milk during most of the period for which damages were awarded) but refused to bottle for plaintiff. In other words, it refused to perform a service for plaintiff over and beyond the service performed for its other customers. What makes the result reached by the lower Courts truly astonishing is the fact that the contract breached would have been, according to those Courts' holdings, a direct subsidy to the plaintiff by defendant over and above defendant's other customers.

The essence of the complaint is breach of contract to bottle milk at 60¢ per hundredweight. The critical question is whether this amount is above or below the bottling cost to the plaintiff since plaintiff, upon defendant's breach of the contract, undertook the bottling operation on his own. If 60¢ is above the cost to plaintiff, clearly

the plaintiff has sustained no damage. If 60¢ is below the cost to the plaintiff, as determined by the lower Courts, clearly the contract discriminates against every other customer of defendant since no other customer had such a subsidy. To carry out such a contract would have been a sure and certain violation of the Antitrust Laws. **The books are full of cases where Antitrust plaintiffs complain they are not getting equal treatment, but no others we know of where the complaint is failure to receive preferential treatment.**

The reply in the opinion of the Court below to this argument is found in Appendix A, pp. 29 and 30, where the Court says:

> "Counsel for North Texas, both in oral argument and in supplemental reply brief, lay great emphasis on the assertion that Young was entitled only to that degree of fair and equal treatment owed by North Texas, the alleged monopolist, to the general public. While the announced principle may be true, it is translated by counsel for North Texas to mean that Young was seeking some special privilege or advantage *not available* to his competitors; and thus it is claimed, Young was not seeking equal treatment.
>
> * * * * *
>
> Factually, it is difficult to conceive how it may be logically argued that Young was seeking some special privilege or advantage *not available* to his competitors."

To analyze the Court's statement, let us review the undisputed facts:

1. Defendant was at all times ready and willing to sell milk to plaintiff on the same basis on which defendant sold to all its other customers.

2. The contract which defendant made to bottle milk for plaintiff was at a price which the Court found to be less than that at which plaintiff could bottle milk for himself.

3. Defendant had no such bottling contract with any other customer except plaintiff.[1]

4. Defendant's other customers protested this bottling contract which was a direct subsidy to plaintiff.

5. At the behest of its other customers, defendant refused to bottle for plaintiff but did deliver plaintiff bulk milk just as to every other customer.

On these facts, plaintiff would have received treatment different from and more favorable than that received by his competitors had the contract been carried out. He alone would have had his product packaged and he alone would have had it done below cost.

The Court below purports to avoid this result by speculating that other customers of plaintiff might also

[1] "Q. (To plaintiff) Subsequent to this dispute concerning this contract, isn't it a fact that you purchased milk from the North Texas Producers Association, raw milk?
A. Yes, sir." (R. 359)

* * * * * *

"Q. Now, during the eighteen months shown on Exhibit 1 that you have purchased raw milk in bulk from the Association, did they cooperate with you in any way that they didn't cooperate with any other handlers, as far as you know?
A. Yes. They standardized milk for me." (R. 360)

* * * * *

"Q. You are aware, aren't you, Mr. Young, that the Association, North Texas Producers Association, is ready, willing and able to sell and supply you raw milk in bulk on the same terms and conditions that they supply every other handler in this area, are you not?
A. Yes, sir.
Q. You know—you know that the Association does not bottle milk for any other handler or other party, don't you?
A. Yes, I think so." (R. 361)

on request, have received contracts to obtain bottled milk. This seems to us to be a complete *non sequitur*. The point is that no other customer had such a contract and until one did plaintiff stood alone. Actually there is not the slightest suggestion in the record that any other customer could have had such a contract or required such a contract; on the contrary, the record shows clearly that every other customer already had made adequate bottling arrangements of his own. But the point is that, since only plaintiff had such a contract, breach of the contract did not deny plaintiff equal treatment, but put him on the same basis as everyone else.

Even if we accept the Appellate Court's speculation and agree that others might have obtained bottling contracts, surely there is nothing in the record to indicate that their contracts would have been carried out although plaintiff's contract was breached or that plaintiff's contract would have been breached under such circumstances. Where, we respectfully ask, is there a failure to accord plaintiff "that degree of fair and equal treatment owed * * * to the general public?" He got what everyone else got. Not bottling, but then no one else did either!

Of course, defendant's fundamental position is that, while there is an antitrust obligation to deliver milk in bulk to plaintiff and others, there is no antitrust obligation to bottle milk, and breach of a contract to bottle milk, whether resulting from a conspiracy or otherwise, gives rise only to an action for simple breach of contract. The fact that the bottling contract subsidized plaintiff is merely an added reason for refusal to carry out the contract. Such a subsidy would have violated not only the antitrust laws, but would surely have been an illegal method of evading the Federal price orders in force in the Dallas area.

II.

Plaintiff Should Not Have Been Excused from Proving Damages Reliably, When This Was Clearly Within His Power

Plaintiff's basis for damages for breach of the contract to bottle milk is plainly the difference between the contract cost and his actual bottling cost while operating as Jere Dairy, Inc. The contract cost is, of course, specified. Plaintiff never did show his actual bottling cost but was relieved from that responsibility by the Court below with the statembent (App. A, p. 36):

> "The wrong done to Young was a tort and the wrong itself was of such a nature as to render it virtually impossible to prove the amount of damages with positive certainty and precision."

How the breach of contract to deliver bottled milk prevented plaintiff from showing his actual cost of bottling is not mentioned by the Court. In point of fact, plaintiff, a highly successful businessman, had about four years of experience in bottling on his own account. There is no reason in justice or in equity why he should not have demonstrated to the Court and the jury what his bottling costs were. Under the circumstances, it is absolutely impossible to tell whether his cost was above the contract price, below the contract price, or equal to the contract price. When asked for this information on cross examination he blamed his accountant for his inability to come up with this figure (R. 368).

III.

Admitting the Kansas City Bid Price Evidence Was Highly Prejudicial Error.

Plaintiff, in an effort to show substantial damages, offered in evidence the cost of obtaining bottled milk

from Kansas City, Missouri. This was done over the strenuous objection of defendant. The highly prejudicial nature of this evidence is shown by the exhibits themselves from which the jury could have concluded that plaintiff had sustained damages of about $100,000.00 a year for four years.

No milk was ever obtained by plaintiff, or plaintiff's corporation, from Kansas City. The sole effect of this evidence was to completely confuse the jury as to plaintiff's actual damages. To emphasize the ridiculous nature of this evidence, we point out that the Kansas City price for bottling for plaintiff was $2.70 over the Class I milk price. Of this amount $1.75 was to cover transportation costs for the round trip haul from Kansas City to Dallas.

We respectfully ask the Court if there can be any reason why the introduction of this evidence, wholly unnecessary and unjustified, was not seriously prejudicial.

Compare the punctilious care which Judge Friendly took to prevent inflaming a jury in a treble damage case in *Schwabe v. United Shoe Machinery*, 297 F. 2d 906 (C.C.A. 2, 1962).

That Court said at page 912:

> "There is no bright line that divides evidence worthy of consideration by a jury, although subject to heavy counter-attack, from evidence that is not. Especially because of the guaranty of the Seventh Amendment, a federal court must be exceedingly careful not to set the threshold to the jury room too high. Yet it is the jury system itself that requires the common law judge, in his efforts to prevent the jury from being satisfied by matters of slight value, capable of being exaggerated by prejudice and hasty reasoning * * * to exclude matter which does not rise to a clearly sufficient degree of value'; 'something more than

> a minimum of probative value' is required. 1 Wigmore, Evidence (3d ed., 1940) pp. 409-410. These comments are especially pertinent to an array of figures conveying a delusive impression of exactness in an area where a jury's common sense is less available than usual to protect it. It might indeed have been possible for a judge, with days in which to study the exhibits of plaintiff's expert, to come up with some rational computation of damages, on a theory wholly different from what the expert advocated, that would satisfy the Supreme Court's modest requirements in this area: it would be foolhardy to expect a jury to do so. 'When the risk of confusion is so great as to upset the balance of advantage, the evidence goes out,' Shepard v. United States, 290 U.S. 96, 104, 54 S. Ct. 22, 26, 78 L. Ed. 196 (1933)."

Humbly and urgently we request this Court to look at Exhibits P-27 and P-28 (Appendix E, *infra*, pp. 55-58), to see whether they have any place whatsoever in this lawsuit. Any examination at all will show that they are wholly out of place and could not have failed to give the bewildered jury a completely misleading impression of quantum and of what constitutes proper proof.

IV.

Plaintiff Should not have been Held Liable for Damages beyond the Contractual Period of Six Months

The Trial Court and the Appellate Court allowed damages for a period from the time of the alleged breach of contract in November of 1956 to the date of trial, February 20, 1961. As shown by the Statement of Facts, plaintiff commenced business in April of 1957 and operated very successfully with the full cooperation of defendant from that time until the time of trial. Plaintiff's basis for claiming such an extended period of damages

was the five-year term of the contract. Said contract provided, however (R. 141):

> "In any event, with or without cause, either party hereto shall have the right to cancel this contract by giving the other party six months' advance written notice of such cancellation and termination."

It is apparently plaintiff's position, in which the lower courts presumably concurred, that since no written notice of cancellation was ever given, damages should run for the entire term of the contract up to the time of trial. This position is completely inconsistent with the fact that plaintiff also contends that defendant anticipatorily breached the contract. Plaintiff filed his State suit for anticipatory breach of contract on January 21, 1957 alleging in his petition (R. 380) " * * * on the 3rd day of November 1956 the Defendant Association, acting by and through its Manager, J. O. Woodman, informed Plaintiff that Defendant no longer was willing to be bound by the terms of the contract, that it would not be bound thereby, and that Defendant was as of said time breaching the contract, the Defendant thereby anticipatorily breached said contract by virtue of said breach of contract. Plaintiff suffered damages * * * " In the light of this allegation that plaintiff had actual notice of the alleged breach of contract in November of 1956, it would certainly have been a vain and useless thing for defendant to serve a written notice of cancellation by the exercise of its six months' option.

Stated in other terms, we submit that the law is clear, especially in an action for anticipatory breach, that damages can be recovered by either party solely for the term pursuant to which the other party was absolutely bound to the contract. We believe the authorities on this

point are almost too numerous and too elementary for citation. For the convenience of the Court, we list some of the cases enforcing this doctrine:

Stolz v. Wells, 43 S.W. 2d 163 (Tex. Civ. App. 1931); *City of San Antonio v. Condie*, 329 S.W. 2d 947 (Tex. Civ. App. 1959); *In re Petroleum Carriers Co.*, 121 F. Supp. 520 (D.C. Minn. 1954); *Chevrolet Motor Co. v. McCullough Motor Co.*, 6 F. 2d 212 (C.C.A. 9, 1925); *Pecarovich v. Becker*, 248 P. 2d 123 (Cal. App., 1952); *Derry v. Board of Education*, 108 Mich. 631, 61 N.W. 61 (1894); *Louisiana Oil Corp. v. Bryan*, 165 Miss. 157, 147 So. 324 (1933); *Tousley v. Atlantic City Ambassador Hotel Corp.*, 25 N.J. Misc. 88, 50 A. 2d 472 (1947); *Watson v. Russell*, 149 N.Y. 381, 44 N.E. 161 (1896); *Bitterman v. Gluck*, 256 Appellate Div. 336, 9 N.Y. Supp. 2d 1007 (1939); *Frieburger v. Texas Co.*, 216 Wisc. 546, 257 N.W. 592 (1934); *Fife v. Great Atlantic & Pacific Tea Co.*, 166 Pa. Sup. Ct. 77, 70 A. 2d 369 (1950).

This same principle of law has been afforded recognition in antitrust litigation in *Alexander v. The Texas Company*, 149 F. Supp. 37, 165 F. Supp. 53 (W.D. La. 1958), wherein the Court stated at 149 F. Supp. 44:

> **"Finally, plaintiff has not alleged any recoverable damage proximately resulting from this alleged antitrust violation. The damages he claims, as shown by his deposition, are computed on the basis of alleged profits he anticipated realizing through continued operation of the service station over a three-year period. Necessarily, this assumes a legal right which did not exist, for by the terms of the lease defendant legally could have cancelled it at the end of any lease-year, as was done. Consequently, the damages he claims for this are purely speculative and are not founded upon any enforceable right."** (Emphasis added).

The Appellate Court here did not discuss the period for which damages were allowable, except to say as to defendant's position (App. A, p. 37):

"These contentions are rejected."

No reference was made to the only prior antitrust case on the subject, squarely in conflict with this holding, being *Alexander v. The Texas Company, supra.*

Under the decision of the Fifth Circuit, there is no determination whatsoever as to the period of defendant's liability. Was it the contract period? The Court rejected this. The conspiracy period? The Court rejected this. One year, two years, five years, one hundred years? Surely, there must be some limit on defendant's liability, but neither of the lower courts has so indicated.

CONCLUSION

I.

The present case represents an extension of private antitrust litigation far beyond any limits heretofore noted. In substance, the lower courts have said that, where a conspiracy between an alleged monopolist and one or more customers to breach a contract exists, there is necessarily a violation of the Sherman Law irrespective of what the contract provides or the effect of its breach. Such a doctrine would truly open the floodgates of treble damage litigation. Granted that the jury found a conspiracy to exist, it is surely material that the contract so breached was a contract to perform a service in no way related to the antitrust laws, but rather a service which, if carried out, would have given plaintiff an undue preference over every other customer of defendant.

II.

There is no justification for plaintiff's failure to prove his actual bottling costs and the assumption of the

Courts below, that damage flowed from the breach of the contract, is a wholly unjustified assumption and an extension of the rules for proof of damages in private antitrust litigation far beyond any limits heretofore set. Such an extension should not be permitted to serve as a precedent in other cases. It is one thing to excuse a plaintiff who cannot prove his damages because of defendant's actions, but entirely different to excuse one who can but will not.

III.

The admission of the Kansas City Bid Price evidence was a flagrant error, highly inflammatory and prejudicial, and in direct conflict with the rule laid down by the Second Circuit Court of Appeals in *Schwabe v. United Shoe Machinery*, 297 F. 2d 906, 912.

IV.

The applicable term for allowance of damages under the circumstances here involved has never been passed on by this Court. It should be, particularly since the only two cases on the point are conflicting.

Respectfully submitted,

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19146

NORTH TEXAS PRODUCERS ASSOCIATION,
Appellant,

versus

KEITH YOUNG,
Appellee.

Appeal from the United States District Court for the Northern District of Texas.

(September 13, 1962)

Before RIVES, CAMERON and GEWIN, Circuit Judges.

GEWIN, Circuit Judge: This is a suit for treble damages under the Sherman Antitrust Act.[1] Keith Young, Plaintiff-Appellee, claims that North Texas Producers Association, Defendant-Appellant, conspired with one or more handlers and producers of milk in the Dallas-Fort Worth area to breach a certain contract with Young in

[1] Sections 1 and 2 provide in substance that:
"1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. * * * Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor. * * *
"2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor. * * * "

violation of the Sherman Antitrust Act and resulting in damage to him (Young)[2]

The jury found in favor of Young and awarded damages in the amount of $100,000.00, which were trebled by the court, to which was added attorneys' fees and judgment with interest rendered accordingly. From this judgment North Texas has appealed, claiming substantially as follows: the complaint did not state a cause of action; there was no evidence of a violation of the Sherman Act; only the simple breach of a contract is involved; and the damages proved, if any, were speculative.

On July 13, 1956, Young and North Texas entered into a contract in Dallas, Texas, by the terms of which North Texas agreed to sell bottled milk to Young in one gallon glass containers. Young had been engaged in the business of milk production and distribution in Kansas City, Kansas, prior to 1956 when he came to Dallas. The contract provided that North Texas was to furnish Young's requirements of milk ready for distribution; and Young was to obtain the necessary permits to do business, including a permit to use a particular type label required in the area. The name of North Texas was not to be used on the label unless it consented. Actual performance of the contract was to commence when the necessary preparations were completed.

In November 1956, North Texas informed Young

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[2] The following is from the Court's jury charge:

"A conspiracy—and 'contract', 'combination' or 'conspiracy' mean essentially the same thing in this case—is an agreement between two or more persons shown either by words or by deeds. In this suit the plaintiff alleges that North Texas Producers Association conspired with one or more of seventeen handlers and distributors of milk in the Dallas - Ft. Worth area, namely, Bluff View Farms, The Borden Company, Boswell Dairies, Brooks Dairy, Inc., Cabell's Inc., Foremost Dairies Inc., Lucerne Milk Company, Lyles Dairy, Metzger Dairies, Oak Farms Dairy Products, Schepps Dairy, Stripling Dairy, Marigold Milk Company, Foremost Dairies, Triangle Dairy, Vandervoort's Dairy, Inc. and Golden Gate Dairy."

that it would not go through with the contract. According to Young, supported by a finding of the jury, the chief reason why North Texas refused to perform the contract was that the other milk handlers and distributors in the area objected to it; and had made an agreement with North Texas that they, the handlers and distributors, would pay North Texas an additional one cent per quart for milk for the refusal of North Texas to perform the agreement with Young. With one minor exception, the largest retail container of milk in the market prior to the North Texas - Young contract was a half gallon paper carton which sold for approximately 50 cents. Accordingly, members of the public who wished to purchase a gallon of Class I milk in the area, were required to purchase two half gallon paper cartons at a cost of approximately 96 cents. If the contract between Young and North Texas had been performed, Young proposed to retail Class I milk in gallon jugs at 69 cents, or approximately 27 cents less than the prevailing price. After the contract was breached by North Texas, Young became part owner and general manager of Jere Dairy, Inc., and actually sold milk in Dallas at "the average out-of-store price to the consumer" at "just a shade over 69 cents".

Before the alleged arrangement was worked out between North Texas and the other milk handlers and distributors, North Texas had made preparations to fulfill its obligations under the contract with Young. North Texas had done some bottling on a small scale but prior to the contract with Young had not engaged extensively in processing and bottling milk. In making ready to perform the contract with Young, North Texas actually spent approximately $20,000.00 in the purchase of washers, fillers, separators, homogenizers, tanks, glass jugs, cases, caps and other necessary equipment and supplies.

At the time of the execution of the North Texas-Young contract, there were approximately 18 distributors of Class I milk in the Dallas - Fort Worth marketing area. North Texas furnished approximately 85% of the milk handled by such distributors. There was only one small company at that time which was engaged in the business of selling Class I milk in gallon glass containers, which amounted to approximately one-half of one percent of the business in the market area. To a very substantial degree, the consuming public was dependent upon the distributors and milk handlers mentioned for a supply of Class I milk.

For some time prior to the breach of the North Texas - Young contract, North Texas had been endeavoring to induce the distributors and milk handlers to pay it a premium for Class I milk over the federally regulated minimum price. When it became known that the distributors were anxious to upset the North Texas - Young arrangement, an agreement was reached between North Texas and the handlers and distributors whereby North Texas would refuse to perform the contract with Young and the distributors would increase their price to North Texas by the sum of 40 cents per hundred weight—at least the jury so found and there was evidence to that effect. Although it is stoutly argued that there is no causal connection between the breach of the Young contract and the increase in price to North Texas, both events occurred in close proximity of time. The result of this increase of 40 cents per hundred weight to North Texas, which is approximately one cent per quart, was to raise the wholesale price of milk in Texas wherever federal marketing orders were in effect, namely, Dallas, Fort Worth, Wichita Falls, Amarillo and certain other Texas cities. The effect on the retail price to the consuming public in the Dallas - Fort Worth area was an advance of one cent per quart. There was evidence to the

effect that the increase was worth approximately one and a half million dollars to North Texas over the four months period of the price increase.

On December 2, 1958, Young filed the instant suit in the United States District Court alleging that North Texas had conspired with certain named distributors and individuals to refuse to sell him processed Class I milk bottled in one gallon glass containers, and upon trial the jury found this allegation to be true. The thrust of the argument of North Texas on this appeal is not aimed at the existence vel non of a conspiracy, but strongly asserts that Young did not state a cause of action under the anti-trust laws and suggests an action for simple breach of contract.

The distinguished trial judge clearly and fairly instructed the jury on the issues involved; and several special issues were submitted to the jury. No errors are specified with respect to the instructions given to the jury by the court or with respect to the refusal or the giving of any special instructions. In effect, the jury found that on November 2, 1956, Young had the intention and was prepared to enter the milk business in the Dallas - Fort Worth area pursuant to the mentioned contract, and on that date North Texas entered into a contract, combination or conspiracy with one or more of the handlers and distributors of milk in that area whereby it was agreed that if such handlers and distributors would voluntarily pay the price increase for milk they were to purchase from North Texas from November 5, 1956 to February 28, 1957, North Texas would refuse to sell Class I bottled milk in one gallon glass containers to Keith Young; that the arrangement between North Texas and such milk handlers and distributors operated as a restraint of trade or commerce among the several states as such term had

been explained in the court's charge; and assessed the damage suffered by Young to the date the trial began on February 20, 1961, as the result of the conspiracy, at the sum of $100,000.00.

North Texas' motion for judgment N.O.V. was overruled and its alternative motion for a new trial was overruled. The court concluded that the jury's verdict was amply supported by the evidence; that the plaintiff was entitled to judgment on the verdict and that the damages found by the jury should be trebled. After taking testimony, the court fixed as reasonable attorneys' fees for Young's counsel the sum of $20,000.00 for services rendered in the District Court.

The Sherman Antitrust Act was characterized by Chief Justice Hughes in *Appalachian Coal, Inc. v. United States*, 288 U.S. 344, 359-60, 77 L. Ed. 825 (1933), "as a charter of freedom * * * has a generality and adaptability comparable to that found to be desirable in Constitutional provisions. * * * The restrictions the act imposes are not mechanical or artificial. Its general phrases, interpreted to attain its fundamental objects, set up the essential standard of reasonableness." That case and many others since have held that the Sherman Antitrust Act should not be required to operate in a straitjacket or be interpreted in a narrow, technical sense.

A background of fundamentals in this field of law was established by Mr. Chief Justice White in *Standard Oil Co. of N. J. v. United States*, 221 U.S. 1, 55 L. Ed. 619 (1911). In explaining the history of the Sherman Act and commenting extensively on the common law as it existed before the act was adopted, the court had much to say about the vast accumulation of wealth and power in the hands of corporations and individuals, the enormous

development of business enterprises, the facility for combination and the widespread impression to the effect that, " * * * their power had been and would be exerted to oppress individuals and injure the public generally". The opinion asserts that "restraint of trade" and "monopolization" had their beginnings before the adoption of the act, but are not confined to a narrow conception of the common law. Even the early common law and English Statutes condemned monopolistic power to fix prices to the injury of the public, to impose limitations on production, and recognized the danger of deterioration in quality which is said to result inevitably from a monopolistic control of production and sale. These background factors and other considerations the court stated, " * * * led, as a matter of public policy, to the prohibition or treating as illegal all contracts or acts which were unreasonably restrictive of competitive conditions".

Important to consider, according to that decision, are the nature or character of the contract or the act, and the "surrounding circumstances" which may support an inference or presumption that they tended " * * * to bring about the evils, such as enhancement of prices, which were considered to be against public policy". The act is to be viewed from a practical common sense point of view and the results of the conditions or the acts involved are to be carefully examined. Section 1 is characterized as " * * * an all-embracing enumeration to make sure that no form of contract or combination by which undue restraint" was accomplished or achieved could save it from the condemnation of the act. It was to reach all "undue restraint". The rule to guide courts in deciding whether or not there has been a violation is " * * * the standard of reason which had been applied at the common law and in this country dealing with subjects of the character embraced by the statute". In a particular case

therefore, such was to be the yard-stick or guide rule to determine whether a particular act had or had not violated the statute. Section 2 was interpreted as a supplement to Section 1 " * * * to make sure that by no possible guise could the public policy embodied in the first section be frustrated or evaded * * * ".

In the same year, the Chief Justice in *United States v. American Tobacco Company*, 221 U.S. 106, 55 L. Ed. 663, concluded that American had violated both Sections 1 and 2 of the act, " * * * not alone because of the dominion and control over the tobacco trade which actually exists, but because we think the conclusion of wrongful purpose and illegal combination is overwhelmingly established."

Standard Oil and American Tobacco, with other cases, have certainly established the following general principles:

1. The Sherman Antitrust Act prohibits all " * * * contracts or acts which it was considered had a monopolistic tendency, especially those which were thought to unduly diminish competition * * * " and acts " * * * producing or tending to produce the consequences of monopolies". If there is restraint of trade and monopoly, competition—by whatever means is unduly limited.

2. The Rule of Construction is the Rule of Reason, which requires an interpretation in the light of broad public policy favoring competition and condemning monopoly. The courts are to decide whether conduct is significantly or reasonably anticompetitive in character or effect.

3. Certain types of conduct such as agreements among competitors to fix market prices or control produc-

tion are " * * * conclusively presumed to be illegal, by reason of their nature or necessary effect * * * " and must be adjudged violations of the act.

4. Evidence regarding market position, power of the alleged monopolizers, business practices and the specific purpose to monopolize is to be considered, as well as prior deliberate acts seeking monopoly position, " * * * frequently manifested by acts and dealing wholly inconsistent with the single conception of advancing the development of business power by the usual methods".

As to monopolization through combination, the court said in *American Tobacco v. United States*, 328 U.S. 781, at 814, 90 L. Ed. 1575 (1946):

> " * * * A correct interpretation of the statute and of the authorities makes it the crime of monopolizing, under § 2 of the Sherman Act, for parties, as in these cases, to combine or conspire to acquire or maintain the power to exclude competitors from any part of the trade or commerce among the several states or with foreign nations, provided they also have such a power that they are able, as a group, to exclude actual or potential competition from the field and provided that they have the intent and purpose to exercise that power. * * * "

In commenting upon monopoly power achieved through combination or *conspiracy*, the court in American Tobacco quoted with approval the following language from Judge Hand's opinion in the Alcoa case:[3]

> " * * * It does not follow because 'Alcoa' had such a monopoly, that it 'monopolized' the ingot market: it may not have achieved monopoly; monopoly may have been thrust upon it. If it had been a combination of existing smelters which united the

[3] Aluminum Company of America v. United States, 148 F. 2d 416, 429, (2 Cir., 1945)

> whole industry and controlled the production of all aluminum ingot, it would certainly have 'monopolized' the market. In several decisions the Supreme Court has decreed the dissolution of such combinations, although they had engaged in no unlawful trade practices. * * * We may start therefore with the premise that to have combined ninety per cent of the producers of ingot would have been to 'monopolize' the ingot market; * * * "

Thus it follows that if monopoly power has been achieved through combination or conspiracy, Section 2 has been violated without further proof. "Intent and purpose to exercise that power" is established by proof of the fact of combination or conspiracy. As a practical matter, it is foolish to combine or conspire without an intent to make use of the power resulting therefrom. To hold otherwise would be ridiculous, naive and impractical.

Violations of the act have been manifested in numerous ways as illustrated by the following cases: The act of a group of motion picture distributors who, together, have a monopoly in the distribution of pictures, who combined and conspired to refuse to furnish films to a particular exhibitor, to cause a breach of contracts with him and to prevent him from carrying on his business, *Binderup v. Pathe Exchange, Inc.*, 263 U.S. 291, 68 L. Ed. 308; a conspiracy of competing appliance retailers and manufacturers and distributors of appliances who agreed not to sell appliances to the plaintiff, Klor's, or to sell only at discriminatory prices or on unfavorable terms, even though there were opportunities to buy in a competitive market, *Klor's, Inc. v. Broadway-Hale Stores, Inc., Admiral Corp., et al.*, 359 U.S. 207, 3 L. Ed. 2d 741; the exclusion by a board of trade having monopolistic power, of an owner of a warehouse from a tobacco market, *American Federation of Tobacco Growers, Inc. v. Neal*,

(4 Cir., 1950) 183 F. 2d 869; exclusion of a competitor from a building and an appropriate market for business opportunities without justifiable business reasons, *Gamco, Inc. v. Providence Fruit & Produce Building, Inc.*, (1 Cir., 1952) 194 F. 2d 484; an agreement of brewers of beer not to sell to a particular person or class of persons, *Johnson v. Schlitz* (D.C. E.D. Tenn., 1940) 33 F. Supp. 176; agreement among competitors to fix minimum resale prices of their products, *Kiefer-Stewart Co. v. Seagram & Sons*, (1951) 340 U.S. 211, 95 L. Ed. 219. There are many other cases which present a myriad of situations demonstrating ingenuity, disguise, intrigue and subterfuge to avoid the appearance of law violation.

Many antitrust cases are tedious, involve a number of individuals or corporations, with claims and counterclaims, and usually with conflicting facts. This case is no exception. Counsel, commendably, have filed briefs, supplemental briefs, reply briefs and second reply briefs. Counsel for North Texas, both in oral argument and in supplemental reply brief, lay great emphasis on the assertion that Young was entitled only to that degree of fair and equal treatment owed by North Texas, the alleged monopolist, to the general public. While the announced principle may be true, it is translated by counsel for North Texas to mean that Young was seeking some special privilege or advantage *not available* to his competitors; and thus it is claimed, Young was not seeking equal treatment.[4] In addition, in its second reply brief, North Texas lays great emphasis on the case of *Duff v. Kansas City Star Co.*, 299 F. 2d 320 (8 Cir., 1962). The *Duff*

[4] "We respectfully submit, as pointed out during oral argument, that each one of these cases involved a denial to the plaintiff of that degree of fair and equal treatment owed by the defendant alleged monopolist to the general public. In none of these cases was plaintiff seeking some special privilege or advantage not available to his competitors; rather, he was seeking equal treatment."

[4] From Supplemental Reply Brief of Appellant.

case is cited for the proposition that unless a person is "injured in his business or property", he has no cause of action under the Clayton Act.

We cannot accept the arguments advanced by North Texas and will deal with them in the order stated. Factually, it is difficult to conceive how it may be logically argued that Young was seeking some special privilege or advantage *not available* to his competitors. It is not a special privilege or advantage to enter into the type of contract executed by Young and North Texas. To make a contract may be a privilege and certainly, the parties to it hope it will be advantageous, but we see nothing "special" involved here. Further, no valid reason has been given to indicate that the same privilege or advantage was not available to other handlers and distributors of milk. From aught that appears, they did not desire such a contract; or if so, no effort was made to obtain one. North Texas claims that because it had engaged in the business of processing and bottling milk on a very minimum scale; and since the production and services rendered to other handlers and distributors was somewhat different from that agreed to be furnished to Young, the contract resulted in a special privilege or advantage to Young.

Actually, other handlers and distributors of milk were selling gallons of milk to the public, if the public desired to buy two half gallons and pay a much greater price. Young proposed to sell a single gallon container of milk at a price approximately 27 cents below the price being charged by other handlers and distributors for two half gallons. It is difficult for us to believe that the business of placing milk in a single gallon container with the processing incident thereto is a special privilege or advantage not available to Young's competitors in the

market. The mere fact that they had never undertaken such an operation, had not requested North Texas to render the same service agreed to be furnished to Young, does not establish the existence of a "special privilege or advantage not available to his [Young's] competitors". We cannot square the position of North Texas with the following holding in *Gamco, Inc., v. Providence Fruit & Produce Bldg., Inc., supra*, 194 F. 2d 484:

> "The Act does not merely guarantee the right to create markets; it also insures the right of entry to old ones. See United States v. New England Fish Exchange, D.C. Mass., 258 F. 732; United States v. Tarpon Springs Sponge Exchange, 5 Cir., 142 F. 2d 125.
>
> "Thus in American Federation of Tobacco Growers v. Neal, 4 Cir., 183 F. 2d 869, 872, defendant trade association, which regulated and administered tobacco warehouse sales in the Danville, Virginia, area, denied plaintiff co-operative access to the local auctions. Plaintiff tried to proceed independently, but failed to attract buyers enough to make his own auctions a success. Holding that the exclusion of competing warehousemen constituted a violation of the Sherman Antitrust Act, the court said, ' * * * having set up the market in this way, defendants may not be heard to say that they have not established a monopoly merely because they do not interfere with an outside warehouse if it can shift for itself.' To the same effect is United States v. Terminal Railroad Ass'n of St. Louis, 224 U.S. 383, 32 S. Ct. 507, 56 L. Ed. 810, holding illegal the control of existing approaches to St. Louis by less than all competing railroads."
>
> "The conjunction of power and motive to exclude with an exclusion not immediately and patently justified by reasonable business requirements establishes a prima facie case of the purpose to monopolize."

To the same effect is *Vines v. General Outdoor Advertising Co.*, 171 F. 2d 487:

> "The Anti-Trust Acts give a right of action to 'any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws'; and it has been repeatedly held that those are within this language who have been so injured though they have no contract with the wrongdoer, but only an expectation of future dealings with him."

In *Delaware Valley Mar. Sup. Co. v. American Tobacco Co.*, (D.C. E.D. Pa., 1960) 184 F. Supp. 440, the identical argument as made by North Texas here was made there. We agree with the holding of the court in that case:

> "Section 4 of the Clayton Act authorizes the recovery of treble damages by any person who is injured in his 'business' or 'property' by reason of anything forbidden by the anti-trust laws. Defendants contend that since plaintiff never actually engaged in business, it had no business within the intendment of Section 4. Defendant's argument necessarily presupposes that when Congress authorized treble damage suits it meant to distinguish between the rights of persons who are put out of business and the rights of persons who are kept out of business by a conspiracy. It is unreasonable to suppose that such a distinction was intended by Congress. The purpose of the anti-trust laws is to promote competition and to prevent its restraint. This purpose is no less thwarted when a person who intends and is prepared to embark in trade is stopped at the outset, than it is when a going business is brought to a stand-still. It is as unlawful to prevent a person from engaging in business as it is to drive him out of business. Thomsen v. Union Castle Mail S.S. Co., 2 Cir., 1908, 166 F. 251, 253. The restriction which defendants would place upon the meaning of the

> word 'business' is unwarranted in the context of its Clayton Act usage."

The above statement is amply supported by other well reasoned decisions: *Triangle Conduit and Cable Co., Inc. v. National Electric Prod. Corp.*, (3 Cir., 1945) 152 F. 2d 398; *Goldman Theatres v. Loew's, Inc.*, (D.C. E.D. Pa., 1946) 69 F. Supp. 103, Aff. 3 Cir. (1948) 164 F. 2d 1021.

As stated by North Texas in its second reply brief, "The Duff decision stands for the proposition that unless a person is 'injured in his business or property', he has no cause of action under the Clayton Act." We see no conflict in the holding of the *Duff* case with the decision reached here. First, the *Duff* case presents facts entirely different from those under consideration here. Indeed, the trial court likened the plaintiff in Duff to a stranger who might enter Kansas City "with the desire or wish" to enter the newspaper publishing field; which is to say, that the "desire or wish" is all the stranger had. No property was involved. In effect, the court held that there was no established business (good will) to which the name or trademark there involved attached and then stated: "If none exists, then there is no property right in the name." The court anchored its opinion to former holdings of the Eighth Circuit:

> " * * * [It is settled] in this circuit that there is no such thing as property in a trade-mark except as a right appurtenant to an established business or trade with which the mark is employed * * * "

In addition to holding that after 8 years of non-publication, the plaintiff possessed "neither business nor property, including good will, which could have been damaged by appellees' monopoly within the period of limitation", the concluding statement in the opinion is a quotation from the opinion of the trial court holding that the plain-

tiff's action was barred by the statute of limitations.

Keith Young was guilty of no lethargy or speculative assertion of a mere wish, desire or intention to engage in business. In July he bound himself by the terms of a contract, which the evidence indicates would have been in performance in December. The alleged conspiracy stopped him cold in November. It is our opinion that Young was "injured in his business or property". A valid contract is property. *Milier, et als. v. Howe Sound Min. Co.*, (D.C. E.D. Wash.) 77 F. Supp. 540; *Deutsche Bank, etc. v. Cummings*, (C.C.A. D.C. 1936) 83 F. 2d 554; *Lynch v. United States* (1934) 292 U.S. 571, 78 L. Ed. 1434. The last cited cases, from courts of all levels, conclusively hold that valid contracts are "property".

North Texas seriously objects to the method of proving damages. In one phase of his proof, Young showed that the nearest market to him was Kansas City. He then proved that the "Kansas City cost" for the year 1958 was 60.6 cents per gallon as contrasted with 49.2 cents per gallon as provided in the contract, or a difference of 11.4 cents unit cost. Another method used by the plaintiff is referred to as "cost on actual sales". The sales used were the actual sales of Jere Dairy, Inc. which Young partially owned and actually operated after the breach of the North Texas contract, and which sold milk in gallon glass containers in the Dallas - Fort Worth area. Young offered evidence of what the actual cost per gallon would have been under the breached contract; what his distribution cost per gallon would have been using average figures for the years involved over the period in question based on Jere Dairy's actual distribution cost experience; and the prices at which gallon containers of milk actually sold over the period in question. North Texas claims that a better method of proof should have been followed, that the proof offered was vague, indefinite and inaccurate and

the damages shown are speculative.

In connection with the question of proof of damages, we believe it to be helpful to set forth in the margin the instructions of the court to the jury with respect to which no error is specified.*

* "Our law permits the jury to take into account both any damages which may have been inflicted on existing property, and the damages which may have been sustained as a result of being unable to make profits which reasonably could have been anticipated and would have been realized if it were not for the violation of the antitrust laws, if any such violation occurred. But you are instructed that it must first be determined that any conspiracy which may or may not have existed was a substantial cause to the damage to the plaintiff. In a violation of the antitrust laws, in order for the plaintiff to recover, he must prove that the violation was an identifiable substantial cause of the damage which he sustained. The plaintiff then must satisfy you that the damage, if any, which he suffered was a fact attributable to the conspiracy, if any there existed. But while the plain-(sic) he may have sustained was the result of the conspiracy, he would not have to prove with exact mechanical accuracy the extent of the damage.

"In considering the element of future profits in determining what damages, if any, were sustained by plaintiff you are instructed that if because of the conspiracy the plaintiff was unable to earn net profits which would have accrued to it, but for the conspiracy, then plaintiff was in fact damaged. Future profits mean net profits and are determined by subtracting the costs and expenses of a business from its gross revenue. The fact that a plaintiff's business may have been new or unestablished is not fatal to the element of damages constituting net profits. You are instructed that you may consider in determining whether or not any part of plaintiff's damages constitute future net profits the uncertainty which makes the success of a new business problematical, the experience of the plaintiff in the milk business, the competition which the plaintiff would have had in the Dallas-Ft. Worth area, and the general market conditions in such area. And you may also take into consideration as a reduction of any damages for loss of future profits which you may find, any net profits which Keith Young made in the milk business subsequent to 1956. You may not base any finding of damage on sheer guesswork but must make a just and reasonable estimate of the damage based on the relevant evidence.

"Under the antitrust laws if the plaintiff ultimately prevails, the judgment which he would be awarded would be three times the amount of damages which the jury finds, but you are instructed that you are only to calculate damages, if any, upon the basis of single, and not treble, damages; the trebling of the amount of damages is not part of the jury's function and is solely a matter for the Court. Likewise, you are not to take into account any problem with respect to counsel's fees. If counsel's fees are to be awarded, that is the Court's function. You are also not to take into consideration any interest on any damages which you may find, since where treble damages are available interest is not appropriately allowed.

"The burden of proof in this case is upon the plaintiff and that means he must sustain any right to a recovery herein by a preponderance of the evidence admitted during the trial. By the term 'preponderance of the evidence', as used in this charge, is meant the greater weight or degree of credible evidence in the case." (Tr. Vol. II, pp 693-4)

It is settled law that the courts tend to find some way in which damages can be proved and awarded where a wrong has been committed. Difficulty in ascertaining the amount of damages is not to be confused with the right of recovery. When wrongdoers, by their very actions, make it virtually impossible to prove damages precisely, they should not be heard to complain of the method of proof, if the method allowed by the trial court is reasonable under the facts and in the circumstances of the case. To hold otherwise would permit one to profit by his own wrong and to violate the law and avoid the penalty. Thus, in antitrust cases, comparison of receipts before and after the alleged unlawful action, though not precisely accurate, is considered valid proof. *Bigelow v. R.K.O. Radio Pictures*, 327 U.S. 251, 90 L. Ed. 652 (1946). The wrong done to Young was a tort and the wrong itself was of such a nature as to render it virtually impossible to prove the amount of damages with positive certainty and precision. As held in *Story Parchment Co. v. Patterson P. Paper Co.*, 282 U. S. 555, 75 L. Ed. 544 (1931), "* * * it would be a perversion of fundamental principles of justice to deny all relief to the injured person and thereby relieve the wrongdoer from making any amend for his acts". It is sufficient "if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only proximate". This principle is announced by numerous decisions, of which we cite only a few; *Goldman Theatres, Inc. v. Loew's, Inc.* (D.C. E.D. Pa., 1946) 69 F. Supp. 103, Aff. (C.C.A. 3, 1948) 164 F. 2d 1021; *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 71 L. Ed. 684 (1927). In the instant case, we hold that Young proved his damages in about as precise a manner as the wrong committed by North Texas allowed. The objection of North Texas is not a valid one in view of its own wrongdoing.

Other arguments are made by North Texas claiming that proof of damages should be limited to four months, the period during which it received a price increase; or six months because the contract could be terminated on six months' notice. These contentions are rejected.

North Texas further claims that the contract was impossible of performance because the consent of North Texas to the use of a certain label was required under the contract, and that such consent was not given. There is sufficient evidence in the record to dispose of this rather frivolous contention; but in addition, it is appropriate to say that since the action here involved is one of tort for an unlawful conspiracy in violation of the antitrust laws, this insistence on a technical provision of the contract is without merit. In view of the conspiracy found, we doubt that there was much justification to hope that consent would be given. *Steiner v. Twentieth Century Fox Film Corp.*, (9 Cir., 1956) 232 F. 2d 190.

There is some intimation in the briefs that interstate commerce is not involved.[6] It was stipulated by the parties that North Texas purchased milk across state lines which was mixed with the milk of Texas producers and the jury found in the affirmative on this issue. In our judgment, there was sufficient evidence to establish the fact that interstate commerce was involved.

In summary we hold that this case was tried in a

[6]The following is from the appellant's initial brief:

"We do not propose to urge at length but merely mention that the instant alleged violation did not affect Interstate Commerce. While there was much evidence to the effect that defendant was engaged in Interstate Commerce in that it acquired some raw milk from outside the State of Texas, nevertheless, we must again bear in mind that we are concerned solely with a contract to deliver bottled milk in a limited area. This point was urged below unsuccessfully and will not be reurged here at any length, but is asserted for the preservation of defendant's rights, although other points urged herein have been given greater prominence."

fair and just manner by the distinguished trial court and we agree with the trial court that the facts decided by the jury are amply supported by substantial evidence. Under the applicable rules, there is no justification to disturb the facts found and further, we are persuaded that the conclusions reached by the jury are just and proper. The record in this case clearly demonstrates that there has been a violation of the federal antitrust laws in a positive, direct and flagrant manner. By combination and conspiracy, the milk handlers and distributors together with North Texas combined to stop Keith Young from entering the milk business in the market area involved and they accomplished what they set out to do. Their conduct was restraint of trade and they did monopolize. The public was injured in a real and vital sense because the price of milk was maintained at the level which the conspirators decided to maintain it. Competition was stifled and eliminated. North Texas gained its reward for its action by receiving an increase in the price it was receiving for the product it sold. Keith Young was damaged because he lost a contract—destroyed by combination and conspiracy; and he lost the opportunity to proceed with the contract according to its terms. The competition he could have provided with the prices and gallon containers which North Texas agreed to supply was eliminated.

Young has filed an application for attorneys' fees for services rendered by his counsel on this appeal. We have given consideration to the testimony in the record with respect to the fees fixed by the trial judge for services in the trial court and have considered the services rendered by Young's counsel in this court. For the services of Young's attorneys in this court in handling this appeal, we find and determine that $5,000.00 is reasonable and

said sum is hereby fixed and determined to be reasonable and shall be included and taxed as part of the costs in this Court.

The judgment is

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1964

No. 19146

D. C. Docket No. 8074 Civil

NORTH TEXAS PRODUCERS ASSOCIATION,
Appellant,

versus

KEITH YOUNG,
Appellee.

Appeal from the United States District Court for the Northern District of Texas.

Before RIVES, CAMERON and GEWIN, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged with reference to the application for attorneys' fees for services rendered by appellee's counsel on this appeal the Court finds and determines that $5,000.00 is reasonable for the serv-

ices of Young's attorneys in this court in handling this appeal, and said sum is hereby ordered taxed as part of the costs in this Court.

It is further ordered and adjudged that the appellant, North Texas Producers Association, and the surety on the supersedeas bond herein, Maryland Casualty Company, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

September 13, 1962

Issued:

(280)—Gewin

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 19146

NORTH TEXAS PRODUCERS ASSOCIATION,
Appellant,

Vs.

KEITH YOUNG,
Appellee.

Appeal from the United States District Court for the Northern District of Texas.

(October 17, 1962)

ON PETITION FOR REHEARING

Before RIVES, CAMERON and GEWIN, Circuit Judges.

PER CURIAM:

It is ordered that the petition for rehearing in the above entitled and numbered cause be and the same is hereby DENIED.

Petition for Rehearing Filed 10 3 62
Petition for Rehearing Denied 10 17 62

§ 1. Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided*, That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. As amended July 7, 1955, c. 281, 69 Stat. 282.

§ 2. Monopolizing trade a misdemeanor; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person

or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. As amended July 7, 1955, c. 281, 69 Stat. 282.

§ 15. Suits by persons injured; amount of recovery

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. Oct. 15, 1914, c. 323, § 4, 38 Stat. 731.

P-27 (1)

DIFFERENCES BETWEEN KANSAS CITY AND DALLAS COSTS

	K. C. Class 1 Price for 3.4% BF +$2.70	Dallas Class 1 Price for 3.4% BF + .60¢ NTPA Cont.	Differences Between K.C. N.T.P.A. & Dallas Cost (3)	Actual Monthly Pur. in Pounds (4)	Difference in Dollars (Column 3x4)
1957					
Apr.	$6.92	$5.48	$1.44	10,980	$ 158.11
May	6.90	5.58	1.32	119,550	1,577.40
June	6.87	5.54	1.33	158,730	2,110.71
July	6.87	5.79	1.08	259,290	2,800.44
Aug.	7.24	5.80	1.44	403,260	5,807.52
Sept.	7.39	5.86	1.53	455,880	6,975.27
Oct.	7.24	5.86	1.38	537,870	7,422.02
Nov.	7.24	5.87	1.37	637,880	8,739.23
Dec.	7.26	5.90	1.36	491,130	6,678.96
Average	$7.10	$5.74	$1.36	3,074,570	$ 42,269.66
1958					
Jan.	$7.25	$5.96	$1.29	655,370	$ 8,454.66
Feb.	7.24	5.98	1.26	487,600	6,143.76
Mar.	7.22	5.76	1.46	529,090	7,724.86
Apr.	6.92	5.74	1.18	506,710	5,979.06
May	6.82	5.54	1.28	547,110	7,002.88
June	6.82	5.44	1.38	637,809	8,803.02
July	6.75	5.64	1.11	587,130	6,516.81
Aug.	7.05	5.68	1.37	592,500	8,117.25
Sept.	7.06	5.69	1.37	609,440	8,348.78
Oct.	7.11	5.63	1.48	635,280	9,402.44
Nov.	7.17	5.75	1.42	683,850	9,711.38
Dec.	7.17	5.85	1.32	770,720	10,174.56
Average	$7.05	$5.72	$1.33	7,242,600	$ 96,379.46

P-27-(2)

DIFFERENCES BETWEEN KANSAS CITY AND DALLAS COSTS

	K. C. Class 1 Price for 3.4% BF +$2.70	Dallas Class 1 Price for 3.4% BF + .60¢ (NTPA Cont)	Differences Between K.C. & Dallas Costs (3)	Actual Monthly Pur. in Pounds (4)	(Column 3x4) Difference in Dollars
1959					
Jan.	$7.172	$5.830	$1.342	853,510	$ 11,453.97
Feb.	7.217	5.847	1.370	726,310	9,950.47
Mar.	7.232	5.675	1.557	655,550	10,206.91
Apr.	6.822	5.613	1.209	708,960	8,570.60
May	6.755	5.492	1.263	662,520	8,367.37
June	6.728	5.403	1.325	607,270	8,046.72
July	6.707	5.521	1.186	598,542	7,098.21
Aug.	7.002	5.484	1.518	597,891	9,076.12
Sept.	6.995	5.449	1.546	697,874	10,787.98
Oct.	6.990	5.652	1.338	809,724	10,833.78
Nov.	7.020	5.743	1.277	911,140	11,634.74
Dec.	7.140	5.855	1.285	1,007,590	12,952.80
Average	$6.982	$5.630	$1.352	8,368,881	$118,978.89
1960					
Jan.	$7.154	$5.903	$1.251	1,118,410	$ 13,986.18
Feb.	7.176	5.923	1.253	1,117,920	14,008.54
Mar.	7.146	5.733	1.413	1,085,060	15,331.05
Apr.	6.780	5.705	1.075	1,197,680	12,878.50
May	6.842	5.632	1.210	1,130,513	13,673.79
June	6.805	5.594	1.211	1,098,320	13,296.78
July	6.787	5.847	.940	1,029,510	9,678.24
Aug.	7.032	5.833	1.199	1,193,880	14,316.06
Sept.	7.062	5.851	1.211	1,229,020	14,883.19
Oct.	7.216	5.897	1.319	1,221,420	16,104.99
Nov.	7.369	5.968	1.401	1,302,310	18,241.02
Dec.	7.424	6.066	1.358	1,246,870	16,934.26
Average	$7.066	$5.829	$1.237	13,970,913	$173,332.60

P-28 (1)

DIFFERENCES BETWEEN KANSAS CITY AND DALLAS COSTS

	K. C. Class 1 Price for 3.4% BF + $2.70	Dallas Class 1 Price for 3.4% BF + .60¢ NTPA Cont.	Differences Between K.C. N.T.P.A. and Dallas Cost	Estimated Monthly Purchases in Lbs. from NTPA	Damages in Dollars
1957					
Jan.	$7.05	$6.08	$ .97	180,000	$ 1,746.00
Feb.	6.99	6.08	.91	180,000	1,638.00
Mar.	7.05	5.85	1.20	390,000	4,680.00
Apr.	6.92	5.48	1.44	615,000	8,856.00
May	6.90	5.58	1.32	690,000	9,121.80
June	6.87	5.54	1.33	795,000	10,573.50
July	6.87	5.79	1.08	800,000	8,656.00
Aug.	7.24	5.80	1.44	800,000	11,520.00
Sept.	7.39	5.86	1.53	800,000	12,240.00
Oct.	7.24	5.86	1.38	800,000	11,040.00
Nov.	7.24	5.87	1.37	800,000	10,960.00
Dec.	7.26	5.90	1.36	800,000	10,880.00
Average Total	$7.09	$5.81	$1.28	7,650,000	$101,913.30
1958					
Jan.	$7.25	$5.96	$1.29	800,000	$ 10,320.00
Feb.	7.24	5.98	1.26	800,000	10,080.00
Mar.	7.22	5.76	1.46	800,000	11,620.00
Apr.	6.92	5.74	1.18	800,000	9,440.00
May	6.82	5.54	1.28	800,000	10,240.00
June	6.82	5.44	1.38	800,000	11,040.00
July	6.75	5.64	1.11	800,000	8,380.00
Aug.	7.05	5.68	1.37	800,000	10,960.00
Sept.	7.06	5.69	1.37	800,000	10,960.00
Oct.	7.11	5.63	1.48	800,000	11,840.00
Nov.	7.17	5.75	1.42	800,000	11,360.00
Dec.	7.17	5.85	1.32	800,000	10,560.00
Average Total	$7.05	$5.72	$1.33	9,600,000	$127,360.00

P-28 (2)

DIFFERENCES BETWEEN KANSAS CITY AND DALLAS COSTS

	K. C. Class 1 Price for 3.4% BF +$2.70	Dallas Class 1 Price for 3.4% BF + .60¢ (NTPA Contr)	Differences Between K.C. and Dallas Costs	Estimated Monthly Pur. in Pounds	Damages in Dollars
1959					
Jan.	$7.172	$5.830	$1.342	800,000	$ 10,736.00
Feb.	7.217	5.847	1.370	800,000	10,960.00
Mar.	7.232	5.675	1.557	800,000	12,456.00
Apr.	6.822	5.613	1.209	800,000	9,672.00
May	6.755	5.492	1.263	800,000	10,104.00
June	6.728	5.403	1.325	800,000	10,600.00
July	6.707	5.521	1.186	800,000	9,488.00
Aug.	7.002	5.484	1.518	800,000	12,144.00
Sept.	6.995	5.449	1.546	800,000	12,368.00
Oct.	6.990	5.652	1.338	800,000	10,704.00
Nov.	7.020	5.743	1.277	800,000	10,216.00
Dec.	7.140	5.855	1.285	800,000	10,280.00
Average Total	$6.982	$5.630	$1.352	9,600,000	$129,728.00
1960					
Jan.	$7.154	$5.903	$1.251	800,000	$ 10,008.00
Feb.	7.176	5.923	1.253	800,000	10,024.00
Mar.	7.146	5.733	1.413	800,000	11,304.00
Apr.	6.780	5.705	1.075	800,000	8,600.00
May	6.842	5.632	1.210	800,000	9,680.00
June	6.805	5.594	1.211	800,000	9,688.00
July	6.787	5.847	.940	800,000	7,520.00
Aug.	7.032	5.833	1.199	800,000	9,592.00
Sept.	7.062	5.851	1.211	800,000	9,688.00
Oct.	7.216	5.897	1.319	800,000	10,552.00
Nov.	7.369	5.968	1.401	800,000	11,208.00
Dec.	7.424	6.066	1.358	800,000	10,864.00
Average Total	$7.066	$5.829	$1.237	9,600,000	$118,728.00

CERTIFICATE

The undersigned hereby certifies that copies of the above and foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit have this date been served upon counsel for plaintiff by depositing same in the United States mail, with sufficient postage affixed, addressed as follows:

Mr. Waller M. Collie, Jr.
920 Fidelity Union Life Building
Dallas, Texas

Mr. Logan Ford
c/o Messrs. Burford, Ryburn & Ford
1511 Fidelity Union Life Building
Dallas, Texas

New Orleans, Louisiana, this day of January, 1963.

Office-Supreme Court, U.S.
FILED
FEB 7 1963
JOHN F. DAVIS, CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1962

No. 735

NORTH TEXAS PRODUCERS ASSOCIATION,
Petitioner,

v.

KEITH YOUNG,
Respondent.

RESPONDENT'S REPLY TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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In the

Supreme Court of the United States

OCTOBER TERM, 1962

No. 735

NORTH TEXAS PRODUCERS ASSOCIATION,
Petitioner,

v.

KEITH YOUNG,
Respondent.

RESPONDENT'S REPLY TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable Justices of the Supreme Court of the United States:

KEITH YOUNG, Respondent herein, files this his Reply to the Petition for Writ of Certiorari in the above styled cause, and his Brief in support of such Reply.

RESPONDENT'S COUNTERPOINTS

I. The conspiracy established by the evidence and found by the jury was clearly in violation of the Sherman Act. (Germane to Petitioner's Point I.)

II. Sales of raw milk do not negative the conspiracy to refuse to sell processed and bottled milk. (Germane to Petitioner's Point I.)

III. This is an action in tort for damages from the conspiracy, rather than for breach of contract. (Germane to Petitioner's Point I.)

IV. There is no element of "preferential treatment" or "subsidy" in the case. (Germane to Petitioner's Point I.)

V. The damages are proved with ample certainty and with admissible evidence. (Germane to Petitioner's Points II and III.)

VI. The amount of damages resulting from the conspiracy is not affected by Petitioner's option to cancel the contract on six months' written notice. (Germane to Petitioner's Point IV.)

STATEMENT OF THE CASE

Respondent does not believe that the "Statement of the Case" contained in Petitioner's brief is sufficiently full to apprise the Court adequately of the nature of this litigation. Accordingly, Respondent submits herewith the following statement of basic facts of the case, with appropriate references to the record, and with the parties identified as in the trial court.

In the Spring of 1956, Plaintiff came to Dallas to enter into the business of distributing in the Dallas-Fort Worth area Class 1 milk bottled in one-gallon glass containers (R. 212-213). Before coming to Dallas, Plaintiff had been

engaged in the milk business in Kansas City where he had had experience in various capacities in production, administrative, executive and sales in the receiving, processing, handling, distribution and sales of milk and milk products (R. 100, § 3; 210, 333). In Dallas, Plaintiff contacted J. O. Woodman, who was the general manager and officer and director of the Defendant, North Texas Producers Association, a Texas corporation with administrative offices in Arlington, Texas, and milk processing plants in Muenster and Sulphur Springs, Texas (R. 161; R. 416), through which facilities the Defendant produced, processed and marketed 85% of the milk sold in the Dallas-Fort Worth area (R. 413). Such milk was produced by producer members in Oklahoma and Texas and was in interstate commerce. (Stipulation 32, R. 105, 175, 414-424). On July 13, 1956, Plaintiff and Defendant entered into a contract in writing, under which for a period of five years Defendant agreed to sell to Plaintiff for resale Plaintiff's requirements (R. 170; R. 136-142) of Class 1 milk in one-gallon glass containers (R. 169; R. 212). Under the terms of the agreement, the Defendant was to furnish the raw milk, standardize it as to butterfat content, homogenize it, pasteurize it, bottle it under Plaintiff's label, and deliver it to a receiving station designated by Plaintiff near Dallas. The cost to Plaintiff would have been $.60 per cwt. over the butterfat adjusted Class 1 price, as established by the Milk Market Administrator of the United States Department of Agriculture (Exhibit A; R. 17; R. 169). It was stipulated in the suit that the parties contemplated a 3.4% butterfat

content for milk to be delivered under the contract (Stipulation 5; R. 100).

(It is appropriate here to note the manner in which the minimum price to be paid for milk is regulated by the Department of Agriculture. Briefly, minimum prices are periodically promulgated by the Milk Market Administrator for various classes of milk usage. For example, milk which is utilized for human consumption in cartons or containers (R. 155) in the ordinary connotation of "sweet milk", is a Class 1 usage, and the Milk Market Administrator promulgates a minimum price that must be paid by distributors for milk which is utilized for this purpose. Class II usage is usage of the milk for cottage cheese, condensed milk, etc., and the Milk Market Administrator promulgates a minimum price that must be paid for milk which is so used. The Class II minimum price is always substantially less than the Class I price.) (R. 156-158).

Except for a small amount of incidental bottling, the Defendant had not theretofore been in the business of processing and bottling milk (R. 171), and it was necessary for the Defendant to spend approximately $20,000 for equipment in getting ready to fulfill its end of the agreement. This the Defendant proceeded to do, purchasing washers, fillers, separators, homogenizers, tanks, glass jugs, cases, caps and other necessary equipment and supplies (R. 180-186).

At the time of this transaction between Plaintiff and Defendant, there were 18 distributors of Class I milk in the

Dallas-Fort Worth marketing area (R. 162-163; 730). The Defendant Association furnished approximately 85% of the milk handled by such distributors. There was only one small company at that time which was engaged in the business of selling Class I milk in one-gallon glass containers, this small company doing only approximately one-half of one percent of the business in the marketing area (R. 165). Otherwise, the largest container of Class I milk being generally sold in the Dallas-Fort Worth area was a one-half gallon paper carton of milk (R. 166; 431), which at that time sold for from $.46 to $.50 per one-half gallon (R. 211). It was then generally true that for a consumer to purchase a gallon of Class I milk in Dallas, it was necessary to purchase two one-half gallon paper cartons (R. 166) at a cost of approximately $.96. The retail price of a gallon of milk in a glass container has subsequently been $.69, or approximately $.27 per gallon cheaper than milk was available to the public in the summer of 1956 (R. 393-394).

When word got around to the various Dallas-Fort Worth milk handlers that the Defendant Association was preparing to bottle glass gallons of milk for Plaintiff for sale in the Dallas-Fort Worth area, the various handlers in the area were concerned over the fact that the Defendant had so contracted with a potential competitor who would come into the area and sell a gallon of milk at far less than it was then being sold (R. 191-194). Various of the distributors approached J. O. Woodman and other employees and officers of the Defendant expressed this disfavor (R. 195-196).

For some time prior to November, 1956, the Defendant Association had been endeavoring to induce the local handlers voluntarily to pay a premium for Class I milk over the federally regulated minimum price (R. 200-201). Finally, on November 2, 1956, an agreement was made effective November 5, 1956, between the handlers and the Defendant Association that all of such handlers would pay a price premium of $.40 per cwt. (almost exactly a penny a quart), if the Defendant Association would renege on its contract with Plaintiff and refuse to sell him Class I milk bottled in one-gallon glass containers (R. 203-205; 263) (Note 2). Woodman frankly informed Plaintiff of this agreement and of his reason for refusing to go forward with Producer's end of the contract (R. 263). The effect of this agreement was to raise the wholesale price of milk in Texas, wherever federal market orders were in effect, namely, Dallas-Fort Worth, Wichita Falls, Amarillo, Abilene, Austin-Waco, San Antonio and Corpus Christi (R. 425-427). Its effect on the retail price to the public in the Dallas-Fort Worth area was an advance of $.01 per quart of milk (R. 259), which was sufficient to absorb the increased price of $.40 per cwt. paid Producer's by the handlers in the Dallas-Fort Worth area (R. 259). This increased price of $.40 per cwt. was worth $1,500,000 to the Association over the four months period of the price increase (R. 259-260).

On December 2, 1958, Plaintiff filed the instant suit in the United States District Court alleging that the Defendant had conspired with certain named distributors and individuals (Note 3) to refuse to sell him processed Class I

milk bottled in one-gallon glass containers, which allegation the jury found to be true. The Defendant admitted that it had failed and refused to sell Plaintiff Class I milk bottled in one-gallon glass containers, but attempted to explain away its failure to do so on the basis that Plaintiff was unable to secure an approved label from the health authorities, which was satisfactory to Defendant under the contract (R. 97).

Upon trial of the case to a jury, the matter was submitted to the jury on four special issues, and in its verdict the jury found: (1) that Plaintiff had an intention and was prepared to enter the milk business; (2) that the alleged conspiracy had in fact occurred; (3) that the conspiracy was a restraint of trade or commerce among the several states; and (4) that Plaintiff's damages as caused by the conspiracy were in the sum of $100,000 (R. 695). Judgment was entered by the Court for treble the amount of such damages, plus $20,000 attorney's fees, in a total sum of $320,000 (Note 4). This judgment was affirmed by the United States Court of Appeals for the Fifth Circuit.

Note 1: Beverly Hills Dairy (R. 165).

Note 2: The Western Union telegram of North Texas Producer's Association, dated November 2, 1956, providing for the price increase of .40 per cwt., effective November 5, 1956 through February 28, 1957, appears in the record as an original exhibit. A quote from the telegram appears in the record at page 204, which is as follows:

> "This is to confirm our understanding that all milk delivered to your plant by the Association or its members and utilized in Class 1 will be the Order Class 1 price plus forty cents per hundred. Effective Monday, November 5th, 1956 through February 28, 1957. If you do not agree that we deliver on this basis please advise us immediately."

This telegram was sent to Bluff View Farms, Borden Company, Boswell Dairies, Brooks Dairy, Cabell's Dairy, Crystal Dairy Products, Foremost Dairies, Lucerne Milk Company, Lyles Dairy, Metzger Dairies, Oak Farms Dairy, Schepps Dairy, Jersey Isle Dairy, Stripling Dairy,

Marigold Milk Company, Foremost Dairies, Triangle, Vandervoort's and Golden Gate Dairy (R. 205).

Paragraphs 20 through 25 of the stipulations read as follows:

"20. Effective November 5, 1959, the price of milk sold by North Texas Producers Association to distributors in the Dallas area was increased 40¢ per cwt.

"21. The price increase mentioned in the last preceding stipulation was approximately 1¢ per quart or 4¢ per gallon in the Dallas marketing area.

"22. Such price increase lasted until February 28, 1957.

"23. Such price increase was based upon an agreement had between North Texas Producers Association and milk distributors in the Dallas market area.

"24. Said agreement between North Texas Producers Association and milk distributors in Dallas was negotiated over a period of approximately three to four weeks in advance of the effective date thereof on November 5, 1956.

"25. At the same time of the aforementioned price increase to distributors, the price of milk to the consuming public went up in the Dallas market area 1¢ per quart." (R. 103-104).

Note 3: Bluff View Farms, the Borden Company, Boswell Dairies, Brooks Dairy, Inc., Cabell's, Inc., Foremost Dairies, Inc., Lucerne Milk Company, Lyles Dairy, Metzger Dairies, Oak Farms Dairy Products, Schepps Dairy, Stripling Dairy, Marigold Milk Company, Foremost Dairies, Triangle Dairy, Vandervoort's Dairy, Inc., and Golden Gate Dairy (R. 730).

Note 4: The Issues submitted to the jury and the jury's answers thereto were as follows:

"Special Issue No. 1: Do you find from a preponderance of the evidence that on or about November 2, 1956, Plaintiff had an intention and was prepared to enter the milk business in the Dallas-Ft. Worth area?

"Answer 'Yes' or 'No'.

"Answer: 'Yes'."

"Special Issue No. 2: Do you find from a preponderance of the evidence that on or about November 2, 1956, the Defendant, North Texas Producers Association, entered into a contract, combination or conspiracy with one or more of the following handlers and distributors of milk in the Dallas-Ft. Worth area namely: Bluff View Farms, the Borden Company, Boswell Dairies, Brooks Dairy, Inc., Cabell's, Inc., Foremost Dairies, Inc., Lucerne Milk Company, Lyles Dairy, Metzger Dairies, Oak Farms Dairy Products, Shepps Dairy, Stripling Dairy, Marigold Milk Company, Foremost Dairies, Triangle Dairy, Vandervoort's Dairy, Inc., and Golden Gate Dairy, in which it was agreed that if such handlers and distributors would voluntarily pay a price increase for milk which they were to purchase from the Defendant Association for the period from November 5, 1956 to February 28, 1957, the Defendant, North Texas Producers Association would refuse to sell class one milk bottled in one gallon glass containers to the Plaintiff, Keith Young?

"Answer 'Yes' or 'No'.

"Answer: 'Yes'.

"If you have answered Special Issue No. 2 'Yes' and only in that event, then answer the following Special Issue No. 2A.

"Special Issue No. 2A: Do you find, from a preponderance of the evidence that the contract, combination or conspiracy, inquired about in the

foregoing Special Issue No. 2, if you have found same to exist, was a restraint of trade or commerce among the several states, as these terms have been explained to you in this charge?

"Answer 'Yes' or 'No'.

"Answer: 'Yes'.

"If you have answered Special Issue No. 2A 'No', then do not answer the following Special Issue, but if you have answered Special Issue No. 2A 'Yes', then answer the following Special Issue:

"Special Issue No. 3: What sum of money, if any, would fairly and reasonably compensate the Plaintiff for the damage, if any, sustained by him to the date on which this trial began, February 20, 1961, which was caused by the conspiracy if you have found same to exist?

"Answer by stating the amount in dollars and cents.

"Answer: '$100,000'." (R. 730-732)

SUMMARY OF ARGUMENT

I. The Defendant conspired with major milk handlers of Dallas and Fort Worth to refuse to sell Plaintiff Class 1 milk, bottled in one gallon glass containers, for resale in the Dallas-Fort Worth market, and thereafter did refuse to sell to Plaintiff. Such conspiritorial refusal on the part of Defendant was clearly within the prohibition of the Sherman Anti-trust Act. (For full argument see pp. 11-16.)

II. The conspiracy of which Defendant was convicted by the jury was to refuse to sell a processed and packaged product, to wit, Class 1 milk which had been (1) standardized to butterfat content, (2) homogenized, (3) pasteurized and (4) packaged for delivery. The willingness of Defendant to sell Plaintiff a raw material, to wit, raw milk in bulk, which required Plaintiff to go into another and different business, in no way removes the established conspiracy from the condemnation of the Sherman Act. (For full argument see pp. 16-23.)

III. Plaintiff plead and proved his suit as an action in tort for damages caused him by the forbidden conspiracy.

His right to so proceed is clearly granted by the Clayton Act. While Plaintiff might have been entitled to prosecute in the state court an ex contractu suit for breach of contract, this circumstance does not render the conspiracy any less actionable or preclude Plaintiff from recovering in tort under the Sherman and Clayton Acts. (For full argument see pp. 23-27.)

IV. Petitioner's argument relative to "preferential treatment" and "subsidy" is completely without merit, in that the Defendant was not obligated to deal with Plaintiff alone, and there is nothing in the record to indicate that the means of doing business chosen by Plaintiff was not available to his competitors. (For full argument see pp. 27-32.)

V. Plaintiff proved his damages by accurate book and record data, much of which was stipulated by Defendant, and such evidence clearly establishes both the fact and extent of Plaintiff's damage, which was far in excess of the damages fixed by the jury's verdict. (For full argument see pp. 32-47.)

VI. Since an otherwise enforceable contract is not a prerequisite to recovery under the Sherman and Clayton Acts, the fact that Defendant could have terminated its contractual obligation on six months notice is of no relevancy in the case. Defendant's refusal to sell to Plaintiff was found to be pursuant to the illegal conspiracy, and such refusal was actionable under the antitrust statutes even if there had been no contract at all. (For full argument, see pp. 48-55.)

ARGUMENT

I. The conspiracy established by the evidence and found by the jury was clearly in violation of the Sherman Act.

In its briefing of this case, Petitioner nowhere attacks the sufficiency of the evidence to support the jury's finding that the alleged conspiracy did in fact occur. This is understandable in view of the overwhelming evidence—including even admissions—that the Defendant did in fact enter into the conspiracy in question. Defendant thus stands convicted—no matter what else Defendant may contend—of having agreed to refuse to sell Plaintiff Class 1 milk bottled in one-gallon glass containers, in exchange for the agreement on the part of the other conspirators to pay Defendant a premium price for milk. Such conduct constitutes a clear violation of Sections 1 and 2 of the Sherman Anti-Trust Act.

Sections 1 and 2 of the Sherman Act "closely overlap and the same kind of predatory practices may show violations of all." *(Maryland and Virginia Milk Products Ass'n. v. U. S., 362 U. S. 458, 4 L. Ed. 2d 880, 886; William Goldman Theatres v. Loew's Inc., 150 F. 2d 738.)*

The action of Defendant in entering into the conspiracy and combination is in and of itself sufficient to violate the Sherman Act. In *U. S. v. Socony Vacuum Oil Company, 310 U. S. 150, 60 S. Ct. 811, 84 L. Ed. 1129*, the Supreme Court said:

> "Conspiracies under the Sherman Act are 'the common law footing'; they are not dependent on the 'doing of any act other than the act of conspiracy' as a condition of liability".

Where the violation of the Sherman Anti-trust laws involves a combination to boycott, refusal to sell or the prevention or destruction of competition, the only requisites of recovery are proof of (1) existence of the contract, combination or conspiracy, and (2) the damage proximately resulting therefrom. *(Radiant Burners, Inc. v. Peoples Gas, Light & Coke Co., 364 U. S. 656, 5 L. Ed. 2d 358, 81 S. Ct. 365; U. S. v. Socony-Vacuum Oil Co., 310 U. S. 150, 84 L. Ed. 1129, 1183; U. S. v. Columbia Pictures Corp., 169 Fed. Supp. 888, 893; U. S. D. C. New York 1959.)*

The contract, combination or conspiracy to exclude Plaintiff from marketing Class 1 milk bottled in one-gallon glass containers in the Dallas-Ft. Worth marketing area is actionable under Sections 1 or 2 of the Sherman Anti-trust law. *(Klor's v. Broadway-Hale Stores, 359 U. S. 207, 3 L. Ed. 2d 741, 744, 745; Binderup v. Pathe Exchange, 263 U. S. 291, 68 L. Ed. 308, 317; Maryland and Virginia Milk Producers Ass'n. v. U. S., 362 U. S. 458, 4 L. Ed. 2d 880, 888, 890; International Salt Co. v. U. S., 332 U. S. 392, 92 L. Ed. 20, 26; U. S. v. Maryland & Virginia Milk Products Ass'n., 179 F. 2d 426, 428, U. S. C. A. Dist. Columbia circ., cert. den., 94 L. Ed. 506; American Federation Tobacco Growers v. Neal, 183 F. 2d 869; American Tobacco Co. v. U. S., 328 U. S. 781, 90 L. Ed. 1575, 1593, 1594; Radiant Burners v. Peoples Gas Co., 364 U. S. 656, 5 L. Ed. 2d 358, 81 S. Ct. 365; Gamco v. Providence Fruit & Produce Building, Inc., 194 Fed. 2d 484, 486, 1st circ. 1952.)*

A closely similar factual situation was before the Supreme Court of the United States in *Klor's v. Broadway-Hale*

Stores, 359 U. S. 207, 3 L. Ed. 2d 741, 79 S. Ct. 705. There plaintiff operated a retail appliance store next door to a chain store retail outlet for the same products. Plaintiff alleged that the chain store conspired and combined with ten manufacturers of such products and their distributors so that these manufacturers would not sell to plaintiff, or would sell at discriminatory prices and on highly unfavorable terms. Upon proof that there were hundreds of dealers in similar items in San Francisco, and some within a few blocks of plaintiff's location, selling competing brands of appliances, the District Court concluded that the lawsuit was a "purely private quarrel" between plaintiff and the chain store which did not amount to a public wrong. The Court of Appeals affirmed, saying there was no charge or proof that defendants had caused the price, quality or quantity offered the public to be affected. The Supreme Court granted certiorari upon this point *(3 L. Ed. 2d 743-744)* and reversed, saying:

> "This combination takes from Klor's its freedom to buy appliances in an open competitive market and drives it out of business as a dealer in the defendant's products. It deprives the manufacturers and distributors of their freedom to sell to Klor's at the same prices and conditions made available to Broadway-Hale, and in some instances forbids them from selling to it on any terms whatsoever. It interferes with the natural flow of interstate commerce. It clearly has, by its 'nature' and 'character', a monopolistic tendency. *As such it is not to be tolerated merely because the victim is just one merchant whose business is so small that his destruction makes little difference to the economy. Monopoly can as surely thrive by the elimination of such small businessmen, one at a time, as it can by driving them out in large groups.*" (Emphasis supplied.)

It is as clear a violation of the Sherman Act to foreclose the entry of a new competitor into a market as to destroy an existing one. In *American Tobacco Company v. U. S., 320 U. S. 781, 90 L. Ed. 1575*, the court spoke as follows:

> "Now the term 'monopoly' as used in Section II of the Sherman Act * * * means the joint acquisition or maintenance between members of a conspiracy formed for that purpose, of the power to control and dominate interstate trade and commerce in commodities to such an extent that they are able, as a group, *to exclude actual or potential competitors from the field*, accompanied with the intention and purpose to exercise such power."

The Act does not merely guarantee the right to create markets; it also insures the right to entry into old ones. *(Gamco, Inc. v. Providence Fruit and Produce Building, 1st Circ., 194 F. 2d 484.)*

The statute prohibits any conduct which monopolizes "any part" of interstate trade, and an otherwise illegal monopoly is not sanctioned merely because it operates in a single city or a particular part of a city and affects only part of the industry involved. *(William Goldman Theatres v. Loew's, Inc. (Circ. Ct. opinion 150 Fed. 2d 738, 744).*

It would thus appear on the basis of the foregoing authorities, and on the basis of the argument contained in Petitioner's brief, it is fair and accurate to say that Petitioner is before this Court tacitly admitting that a conspiracy not to sell to Plaintiff in fact did occur between the Defendant and the other conspirators, but that such conspiracy is not actionable under the Sherman Act only by reason of certain specific arguments advanced by Petitioner. Before proceeding to a seriatim examination of such specific arguments,

Respondent wishes to call to the Court's attention that in many of said arguments, the Petitioner is gratuitously considering only what *it itself* did without cognizance of the fact that its conduct was done *as a portion of a conspiratorial agreement*. In the subsequent replies to Petitioner's specific arguments, Respondent must return again and again to the fundamental reasoning that, acting unilaterally, the Appellant could legally do many things which it could not do when such action was dictated by or done pursuant to a forbidden conspiracy. *(Binderup v. Pathe Exchange, 263 U. S. 291, 68 L. Ed. 308, 317.)*

In discussing this question, the Supreme Court in the case of *Binderup v. Pathe Exchange*, *supra*, states:

> "The allegation of the complaint is that the exhibitor had been procuring films from some of the distributors, but had refused to buy from others, who thereupon induced the former to cease dealing with him, and that all then combined and conspired, in restraint of interstate trade and commerce, to prevent him from carrying on his said business; that they have ever since refused to furnish him with film service, and have caused unexpired contracts which he held with some of them to be illegally canceled. It is difficult to imagine how interstate trade could be more effectively restrained than by suppressing it, and that, in effect, so far as the exhibitor is concerned, is what the distributors in combination are charged with doing and intending to do. *It is doubtless true that each of the distributors, acting separately, could have refused to furnish films to the exhibitor without becoming amenable to the provisions of the act; but here it is alleged that they combined and conspired together to prevent him from leasing from any of them. The illegality consists, not in the separate action of each, but in the conspiracy and combination of all, to prevent any of them from dealing with the exhibitor.* See United

States v. A. Schrader's Son, 252 U. S. 85, 99, 64 L. Ed. 471, 475, 40 Sup. Ct. Rep. 251; Bobbs-Merrill Co. v. Straus, 139 Fed. 155, 191. The contracts with these distributors contemplated and provided for transactions in interstate commerce. The business which was done under them—leasing, transportation, and delivery of films—was interstate commerce. The alleged purpose and direct effect of the combination and conspiracy were to put an end to these contracts and future business of the same character, and 'restrict, in that regard, the liberty of a trader to engage in business'." (Emphasis supplied.)

Let us now examine the arguments advanced by Petitioner in its brief.

II. Sales of raw milk do not negative the conspiracy to refuse to sell processed and bottled milk.

The fallacy of Petitioner's argument in this portion of its brief lies in Petitioner's failure to recognize the fundamental difference between raw milk and the bottled product which Defendant refused to sell to Plaintiff. The one is nothing but a raw material; the other (Class I milk, bottled in one-gallon glass containers) is a finished, manufactured or processed product. It is an extensively modified and changed product from raw milk in bulk. The product concerned in this case was milk which had been (1) standardized to specific butterfat content, (2) homogenized, (3) pasteurized, and (4) packaged in a container suitable for delivery to the consumer.

All of these processes are processes which are applied to a raw material, and which change its character and put it in a marketable form. The kernel of the distinction between the sale of raw milk in bulk and the finished product called

for by the contract appears clearly in these analogies: sugar beets are not the same as sugar which has been refined therefrom; wool fabric by the bolt is not the same as a man's suit which has been fabricated from such fabric; raw cotton is not the same as yarn which has been spun therefrom; crude oil is not the same as gasoline that has been refined therefrom. In each of such instances it is the application of certain processes which convert the raw material into a marketable commodity distinct from the raw material.

This distinction between raw milk and the finished product which Defendant refused to sell was expressly recognized and argued by Defendant in the trial court. In Defendant's Alternative Motion for Judgment Notwithstanding the Verdict, the following allegation appears:

> "3. The undisputed evidence is that under the contract in question, the Defendant was to furnish the Plainti.' a finished (manufactured) product * * *." (R. 717.)

In Defendant's Motion for Instructed Verdict, the following statement appears:

> "* * * the product was to be presented to him in manufactured form * * *" (R. 669).

Defendant's apparent willingness to sell raw milk in bulk was completely irrelevant to its refusal to sell the finished product in question. Petitioner's intention and preparedness was to go into a *distributing* business. By virtue of the conspiracy, he was forced into a *processing* business, and one which was completely different in nature and operation from that which he intended. Defendant's refusal to sell the

finished product is not in any way qualified by its willingness to sell another and different product in bulk. The conspiracy found by the jury excluded Petitioner from the purchase of the finished product in one-gallon glass containers —not from the purchase of raw milk in bulk.

The Defendant's unequivocal refusal to sell the only product in question is clearly established by the following testimony of the Defendant's general manager.

"By Mr. Ford:

"Q. Mr. Woodman, I want to ask you this one question, please, sir. Will you tell this jury, the Court and jury, whether your company North Texas Producers Association, has failed and refused to deliver to Keith Young Class 1 milk, bottled in one gallon glass containers, beginning in November, 1956, and whether you have continued to fail and refuse to deliver such milk to him for each day thereafter down to and including the date of this trial?

"A. We have not delivered the milk during that period.

"Mr. Collie:

"That is all.

"Mr. Ford:

"That is all. Thank you. May I ask one other question if I may? He may stand there if you will let him.

"(By Mr. Ford):

"Q. And you do not propose to deliver that character of milk bottled in one gallon glass containers to Mr. Keith Young at any time in the future?

"A. I cannot answer that yes or no.

"Q. Do you presently intend to deliver under your Producers contract that character of milk bottled in one

gallon glass containers for the balance of the term on that contract?

"A. No, because of the label.

"Q. Thank you very much.

"Mr. Ford:

"We move to strike the phrase, 'because of the label,' and ask the jury not to consider it.

"The Court:

"So rule" (R. 450-451).

In effect, what Petitioner has argued in this portion of its brief is that Plaintiff could go into an alternate or a different business (that of processing, bottling and distributing milk) and thus avoid the harmful effects of the conspiracy. That Petitioner was under no obligation to so proceed, and that such would constitute no defense under the Sherman Act, is amply demonstrated by the following authorities.

In *Gamco, Inv. v. Providence Fruit and Produce Building, CCA 1, 194 F. 2d 484, cert. den., 344 U. S. 817, 94 L. Ed. 636*, plaintiff purchased fruit and vegetables from out-of-state shippers and sold to jobbers and retailers in the city of Providence. Plaintiff's lease in a building owned by one of the defendants was not renewed at its expiration date, and the defendant grounded its refusal to renew on a term of the lease contract. Plaintiff sued for treble damages claiming that its exclusion from the building, the most desirable place of business in town, violated the Sherman Act. The defendants contended that alternative physical accommoda-

tions were available to Plaintiff. In holding for the plaintiff, the court said:

> "Defendants contend, however, that a discriminatory policy in regard to the lessees in the Produce Building can never amount to monopoly because other alternative selling sites are available. The short answer to this is that a monopolized resource seldom lacks substitutes; alternatives will not excuse monopolization * * * To impose upon plaintiff the additional expenses of developing another site, attracting buyers, and trans-shipping his fruit and produce by truck is clearly to extract a monopolist's advantage * * * The Act does not merely guarantee the right to create markets; it also insures the right of entry to old ones * * * It is clear, from the various cases we have cited above, that *exclusion from an appropriate market or business opportunity is actionable, notwithstanding substitute opportunities*—e.g. the facilities of the United Press in United States v. Associated Press, supra." (Emphasis supplied.)

In *William Goldman Theatres v. Loew's Inc. (69 Fed. Supp., 103, 105, affirmed 164 Fed. 2d 1021, cert. den.)*, the question was before the courts as to whether the plaintiff should have attempted to use his theater for second-run movies when he was prevented from securing first-run movies. Concerning this, the court says:

> "Being unable to obtain first-run pictures, Mr. Goldman did not attempt to operate the theater on second or subsequent runs. He was not bound to do so. The duty to lessen damages which the law imposes on an injured party does not go beyond the exercising of ordinary care and incurring moderate expense. He is certainly not required to enter upon and carry on a business differing in important particulars from that in which he has been or intends to be engaged."

The distinction between raw and processed milk is pointed up in the testimony of Defendant's general manager. Had

Petitioner been permitted to proceed as planned, his only business function would have been distribution of a finished product (R. 170-171). The mere sale of raw milk in bulk would have resulted in the necessity of Plaintiff having a plant to handle it, pasteurize it, bottle it and sell it (R. 496).

The distinction is made further clear by a *reductio ad absurdum:* Would an individual, intending and desiring to enter business as a distributor of Ford automobiles, be in the same position if the requirement were imposed upon him to finance, construct and operate a factory for the manufacture of such automobiles?

It is not only the foreclosure of a competitor from a market that violates the act, it is equally unlawful to conspire or combine to gain a competitive advantage or to impose a competitive handicap *(U. S. v. Griffith, 334 U. S. 100, 92 L. Ed. 1236; U. S. v. Associated Press, D. C., N. Y., 52 Fed. Supp. 362, aff. 326 U. S. 1, 89 L. Ed. 2013).* The entire conspiracy and combination in the instant case was designed to eliminate Plaintiff as a distributor of Class 1 milk bottled in one-gallon glass containers. The offer to furnish or the furnishing of raw milk is not only immaterial, but is in fact the imposition of the terms and conditions by illegal joint action under which a competitor would be allowed to enter the market.

Especially significant to the distinction between raw milk in bulk and processed milk in glass gallons is the attitude of the conspirators named in Plaintiff's petition and in the

jury's verdict. According to Mr. Woodman, Defendant's general manager:

> " 'A. I think perhaps there was maybe more apprehension over the fact that he was going to be a gallon jug dealer than there would have been if he was going to be a small dealer in the usual number and kinds of units of distribution. I think there was a little more apprehension on the part that he was going to be a jug dealer, sure.
>
> " 'Q. And the reason for that, and you can tell me—and I have read your testimony about it—the reason for that apprehension and opposition on their part of his coming in as a gallon jug dealer was the disparity or the difference in the sale of milk at gallon jug prices and the sale as was then being made in the Dallas-Ft. Worth area, I believe, in one-half gallon cartons, paper cartons?
>
> " 'A. I think that is a fair statement, that they were afraid of gallon jug prices, sure.
>
> " 'Q. In other words, the competition would be severe and maybe intense by reason of the differential in prices, and that is the reason they particularly objected to the gallon jugs coming into the market, was it not?
>
> " 'A. I think that you could assume that'." (R. 431.)

There is no denying that Petitioner had a favorable contract with the Defendant, yet Petitioner was free—or should have been free—in an open competitive market, to contract as favorably as he could, and to enter business on as advantageous terms as were possible. The contract in question did not seek to bind the Association to sell to Petitioner alone. It in no way inhibited the Defendant from selling on the same or more favorable terms to anyone else. Plaintiff had a legal right to go into business in a free and open competitive market, and would have done so had his efforts not been fore-

stalled by the illegal conspiracy found by the jury to have existed.

By arguing as it has done in this portion of its brief, Petitioner is attempting to warp this case around to where the alleged conspiracy is a refusal to sell milk at all to Plaintiff. *This is simply not the conspiracy alleged nor the one found by the jury to have existed.* The jury has found that the conspiracy in this case was a restraint of trade or commerce among the several states, and that as the result of such conspiracy, the Plaintiff sustained damages (R. 696). Plaintiff need show no more under the Sherman Act.

III. This is an action in tort for damages from the conspiracy, rather than for breach of contract.

In this portion of its argument, Petitioner ignores the fact that Plaintiff's cause of action is founded upon Defendant's violation of the Sherman Act and the jury's finding that Plaintiff's damages were "caused by the conspiracy". Plaintiff sues *ex delictu*—not *ex contractu*. Plaintiff seeks damages as a result of the tortuous conduct of the Defendant, and has not bottomed his cause of action on the breach by Defendant of its obligation to sell under the contract. The distinction is made clear by the opinion of the court in *Johnson v. Joseph Schlitz Brewing Company (D. C. Tenn., 33 Fed. Supp. 176, aff. 123 Fed. 2d 1016)*. In that case the court noted:

> "Defendant next contends that plaintiff failed to prove a valid and enforceable contract between plaintiff and defendant. Here defendant again confuses this first cause of action under the Sherman Act with a suit on a contract. Once an illegal conspiracy in violation of the

> Sherman Act is shown, all the plaintiff need do is to show his damages * * *."

In *Steiner v. Twentieth Century Fox Film Corporation, 232 F. 2d 190*, the Ninth Circuit Court was concerned with a question of when an overt act occurred so as to control the statute of limitations. In passing upon this point, the court said:

> "Appellees state that this cannot be considered an overt act because they were under no obligation to continue to occupy or use the leased premises during the entire term. However, the case at bar is a tort action, based upon the anti-trust laws. *As such there is no need for any contract obligation, only that a violation of the anti-trust laws be alleged.*" (Emphasis supplied.)

In *Vines v. General Outdoor Advertising Company (171 F. 2d 487)*, Judge Learned Hand spoke as follows on the exact point involved:

> "There remains the amorphous claim, based upon the Anti-Trust Acts. The judge held that, since the contracts reserved to the defendant the privilege of withdrawing any 'assigned' advertiser at its pleasure, it could not be a wrong to withdraw the Liebmann Breweries by classing it as a 'national' account and assigning it to Outdoor Advertising Company, Inc. In this we think that he failed to consider the basis of such a claim. The Anti-Trust Acts give a right of action to 'any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws'; and it has been repeatedly held that those are within this language who have been so injured though they have no contract with the wrongdoer, but only an expectation of future dealings with him. There has been indeed much difference of opinion as to what is adequate proof that the 'forbidden' act has caused 'injury', and how great the 'injury' was; but with that we have nothing to do upon a motion for summary judgment. We cannot deny the plaintiff an

opportunity to prove that the defendant would have allowed him to continue to be the solicitor of the Liebmann Breweries, if it had not transferred the account to Outdoor Advertising Co., Inc.; or to prove that that transfer was in pursuance of an unlawful agreement between the two companies. If he should succeed on both issues, it would be no defense that the defendant was not bound to him by contract not to take away assigned advertisers. The absence of any contract obligation gave the defendant no more immunity from that tort than from any other tort * * * *In the case at bar the wrong had nothing to do with any contract between the parties; it would have made no difference if there had been no contract of any kind between them.*" (Emphasis supplied.)

In *Parmalee Transportation Co. v. Keeshin, D. C. Ill., 144 Fed. Supp. 480,* plaintiff had received for several years a contract from the interested railroad companies to transport passengers and their baggage among the eight railroad stations in Chicago. Plaintiff alleges that the railroad conspired with one Keeshin so that the transportation contract was awarded to Keeshin and plaintiff was excluded from the business. In upholding plaintiff's petition against a motion to dismiss, the court said:

"Certainly the defendant railroads may deal with whom they please, and are not compelled to enter into a contract with plaintiff if they do not wish to do so. What they may not do, and what is alleged that they have done, is to deliberately close, to the plaintiff and to everyone except Keeshin, competition in an important field of interstate commerce * * *. The right to deal with whom one pleases does not include 'agreeing or combining with another person in order to deprive a third person of a complete freedom of contract'. And quite aside from the parts allegedly played by Keeshin and Cross, it is clear that non-competitors subject themselves to the prohibitions of the Sherman Act when they conspire to restrain the trade of a third person."

Petitioner might well have chosen to sue Defendant for breach of contract, but instead chose to assert the cause of action on the conspiratorial conduct of the Defendant. While the Plaintiff may be entitled to prosecute in the state court an ex contractu suit for breach of contract, or in tort for inducing a breach of the contract in question, this circumstance does not render the conspiracy any less actionable nor does it prohibit or otherwise preclude Plaintiff from recovery under the Sherman and Clayton Acts. *(Steiner v. Twentieth Century Fox Film Corporation, 232 F. 2d 190; Vines v. General Outdoor Advertising Company, 171 F. 2d 487; Johnson v. Joseph Schlitz Brewing Company, D.C. Tenn., 33 Fed. Supp. 176, aff. 123 Fed. 2d 1016; Gamco, Inc. v. Providence Fruit and Produce Building, 1st Circ., 194 F. 2d 484.)*

Not only do Plaintiff's pleadings in this cause clearly show that the damages which he sought were those accruing to him because of the conspiracy in question, but the evidence adduced at the trial of this cause clearly demonstrates that that was in fact the cause of action proved by this Plaintiff. The gist of the whole conspiracy and combination is succinctly stated in the record at page 263, when the Plaintiff testified as follows:

> "Q. Now, Mr. Young, before we turn to another part of the evidence here and so there won't be any doubt in the record about it, why was it that Mr. Woodman told you that he was refusing to go forward with the contract and to bottle milk for you?
>
> "A. He told me he was refusing to go ahead with it because he had made an agreement with the handlers in Dallas and in the marketing area not to go ahead with my contract in exchange for the increased price to his organization.

"Q. All right. Did he assign any other reason for not going ahead with the bottling agreement with you other than that?

"A. No, sir" (R. 263-264).

While the point is argued more extensively later in this brief, it might not be amiss to here note that while Petitioner's cause of action is predicated upon the conspiracy in question, the contract is look to as affording certain evidence for fixing damages in the case. But the mere fact that the contract is utilized in damage proof in no way affects the nature of Plaintiff's cause of action. A suit for treble damages under the Sherman Anti-Trust law is a suit sounding in tort and not in contract. [*Williamson v. Columbia Gas & Electric Corporation, 110 F. 2d 15, 18, syl. 14 (3d circ. 1939), cer. den. 310 U. S. 639, 84 L. Ed 1407; Imperial Film Exchange v. General Film Company, 244 Fed. Rep. 985, 987, syl. 2; Delta Theatres, Inc. v. Paramount Pictures, Inc., 158 Fed. Supp. 644, 646, syl. 2 (D.C. Eastern Dist. of La., New Orleans Div. 1958), app. dism., 259 F. 2d 563; Rector v. Warner Brothers Pictures, 102 Fed. Supp. 263, 264, syl. 1, U.S. D.C., S.D. Calif., Central Div. (1952); Farmers Co-operative Oil Company v. Socony Vacuum Oil Company, 43 Fed. Supp. 735, 738, syl. 6, D.C., Northern Dist. of Iowa (1942), modified on appeal, 133 F. 2d 101 (8th circ.); Story Parchment Company v. Paterson Parchment Paper Company, 282 U. S. 555, 75 L. Ed. 544, 548, syl. 6.*]

IV. There is no element of "preferential treatment" or "subsidy" in the case.

Petitioner's whole argument concerning "preferential treatment" is fundamentally specious in that it assumes

that the plaintiff had some special privilege or advantage not available to his competitors. That this is simply not true is demonstrated by the fact that plaintiff never sought and never obtained any agreement that the defendant was not perfectly free to make with anyone else if it had so chosen. That is, there is nothing in this case that indicates that defendant was bound in any manner, by tort law or contract law, to sell milk in one gallon containers to plaintiff alone. In fact, the very wording of the supply contract in question indicates that the parties contracted with the possibility in mind that defendant might use the bottling equipment in question to bottle for customers other than plaintiff. (See Paragraph IX of Contract, R. 21.) There is nothing in the record to show that this means of doing business was not available to other distributors, and there was nothing to prevent other distributors from going to the defendant and negotiating similar agreements with him, if such distributors felt that it was economically advisable for them to do so. They were perfectly free to adopt any legitimate business methods to meet the competition of glass gallon jugs which they so feared. *But neither the distributors nor the defendant were free to conspire to refuse to sell to the plaintiff as a means of combatting his potential competition in the Dallas market.* As was pointed out by the Court in the *Gamco* case (supra), under those facts, anyone with a lease in the defendant's building was in a favorable economic position, but that fact in no manner precluded the liability of the defendant for conspiring to refuse to lease the plaintiff's space. The supply contract which plaintiff in this case had was a good contract from the standpoint of both par-

ties, but it in no manner gave plaintiff a preference, because it in no manner inhibited the defendant from making like or similar agreements with other distributors. The opinion of the Court below clearly points up the fallacy in Petitioner's "preferential" argument:

> "We cannot accept the arguments advanced by North Texas and will deal with them in the order stated. Factually, it is difficult to conceive how it may be logically argued that Young was seeking some special privilege or advantage *not available* to his competitors. It is not a special privilege or advantage to enter into the type of contract executed by Young and North Texas. To make a contract may be a privilege and certainly, the parties to it hope it will be advantageous, but we see nothing "special" involved here. Further, no valid reason has been given to indicate that the same privilege or advantage was not available to other handlers and distributors of milk. From aught that appears, they did not desire such a contract; or if so, no effort was made to obtain one. North Texas claims that because it had engaged in the business of processing and bottling milk on a very minimum scale; and since the production and services rendered to other handlers and distributors was somewhat different from that agreed to be furnished to Young, the contract resulted in a special privilege or advantage to Young.
>
> "Actually, other handlers and distributors of milk were selling gallons of milk to the public, if the public desired to buy two half gallons and pay a much greater price. Young proposed to sell a single gallon container of milk at a price approximately 27 cents below the price being charged by other handlers and distributors for two half gallons. It is difficult for us to believe that the business of placing milk in a single gallon container with the processing incident thereto is a special privilege or advantage not available to Young's competitors

in the market. The mere fact that they had never undertaken such an operation, had not requested North Texas to render the same service agreed to be furnished to Young, does not establish the existence of a "special privilege or advantage not available to his [Young's] competitors". We cannot square the position of North Texas with the following holding in *Gamco, Inc. v. Providence Fruit & Produce Bldg., Inc., supra*, 194 F. 2d 484:

> "The Act does not merely guarantee the right to create markets; it also insures the right of entry to old ones. See United States v. New England Fish Exchange, D. C. Mass., 258 F. 732; United States v. Tarpon Springs Sponge Exchange, 5 Cir., 142 F. 2d 125.
>
> "Thus in American Federation of Tobacco Growers v. Neal, 4 Cir., F. 2d 869, 872, defendant trade association, which regulated and administered tobacco warehouse sales in the Danville, Virginia, area, denied plaintiff co-operative access to the local auctions. Plaintiff tried to proceed independently, but failed to attract buyers enough to make his own auctions a success. Holding that the exclusion of competing warehousemen constituted a violation of the Sherman Antitrust Act, the court said, '* * * having set up the market in this way, defendants may not be heard to say that they have not established a monopoly merely because they do not interfere with an outside warehouse if it can shift for itself.' To the same effect is United States v. Terminal Railroad Ass'n of St. Louis, 224 U. S. 383, 32 S. Ct. 507, 56 L. Ed. 810, holding illegal the control of existing approaches to St. Louis by less than all competing railroads."
>
> "The conjunction of power and motive to exclude with an exclusion not immediately and patently justified by reasonable business requirements es-

tablishes a prima facie case of the purpose to monopolize."

Petitioner's whole argument concerning a "subsidy" to Respondent is simply without basis in fact or reason. Petitioner blandly argues that merely because plaintiff's cost under the Producer's Association contract would have enabled him to make more profit than he was able to make as part owner of a combination processing and distributing plant, that thereby he would have been "subsidized" by the contract. In so doing, Petitioner assumes that there is something inherently illegal in a person contracting to go into business on as favorable terms as are possible, and on a basis that will keep his costs as low as possible. Plaintiff has never denied that he had a contract that he wanted the defendant to live up to. If the agreement had not been a favorable one, he could not have demonstrated the heavy damages that were proved. The contract would have enabled him to go into a pure distribution business with a maximum of time to devote to his distribution business and with a minimum of capital and risk. The conspiracy forced him into another and different business, and in fact, this was the very aim and purpose of the conspirators—to prevent plaintiff from entering the market on any terms except terms acceptable to the conspirators. Under the natural laws of competition, he whose costs are lower can sell for less, and it was with full knowledge of this truth that the defendant and its co-conspirators conspired to forestall plaintiff's threatened competition. Far from representing a subsidy to plaintiff, the contract in fact represented the

work of a free competitive process. The conspiracy effectively disrupted such process.

Although Petitioner's argument in this connection is completely without merit, Respondent wishes to point out that no mention of "preferential treatment" or "subsidy" ever appeared in Defendant's answers in the trial court (see Defendant's Amended Answers, R. 51-60, 66-68), nor was this contention ever urged defensively in pre-trial of this cause (see that portion of Pre-trial Order denominated "Defendant's Claims", R. 97), nor were jury issues ever requested by Defendant submitting such defense. (R. 695-696.) Likewise, Petitioner's incidental reference to an evasion of the Federal price orders is without basis in fact and was never plead, raised or mentioned in the trial court. There is not a word of evidence in the record that defendant's processing costs would have been in excess of its actual costs, and defendant has never contended that this was so.

V. The damages are proved with ample certainty and with admissible evidence.

There is no hard and fast rule as to the measure of damages which should be applied in a Sherman Anti-trust case. The cases assume such a variety of factual situations that the courts try to tailor a measure of damages which will be compensable, fair and reasonable in each case (*Twentieth Century Fox Film Corp. v. Brookside Theaters Corp., 194 Fed. 2d 846, 855 (8th Cir. 1952, cert. den. 343 U. S. 942; 96 L. Ed. 1348).* To illustrate, where the purpose and effect of the conspiracy—to refuse to sell—is to exclude a competitor

from the market, the measure of damages may take the form of "loss of profits". *(Bigelow v. RKO Radio Pictures, Inc., 327 U. S. 251, 90 L. Ed. 652, 659; Eastman Kodak Company v. Southern Photo Material Company, 273 U. S. 359, 71 L. Ed. 684, 690.)*

Since in the present case the illegal conspiracy resulted in the breach of a contract to sell, the law of sales may be looked to for an appropriate measure of damages.

The ordinary measure of damages for a seller's failure to sell goods according to contract is the difference between the contract price and the market value of the goods at the time and place of delivery, if there is an available market. *46 Am. Jur. 802; 78 Corpus Juris Sec. 227; 37B Tex. Jur. 76.*

Under special circumstances, as where there is no available market in which the goods can be purchased, other elements of damage may be proved and recovered, including any special damage which may reasonably be considered as within the contemplation of the parties at the time of making the contract. Thus, where the parties, as in this case, knew that the goods were purchased for resale, the buyer may recover his loss of profits on the expected resale. *Pace Corporation v. Jackson, Sup. Ct., 155 Tex. 179, 284 S. W. 2d 340; West Lumber Co. v. R. C. Cummings Export Co., Tex. Com. App. 228 S. W. 911; Rios v. Lowenfield, Tex. Civ. App. 289 S. W. 2d 332, error ref. n.r.e. syl. 6; Everman v. Cohen, C. A. 2, 199 Fed. 2d 857, syl. 12; 37 B. Tex. Jur. 72, 80; 78 C.J.S. 242, 244.*

It is well settled that the *fact* of damage must be proved with reasonable certainty; thereafter, the *amount* of dam-

ages is subject to much less rigid requirements of certainty. *(Story Parchment Company v. Paterson Parchment Company, 282 U. S. 555, 75 L. Ed. 544; Twentieth Century Fox Film Corp. v. Brookside Theatre Corp., 194 Fed. 846, 855 (cert. den.), 96 L. Ed. 1348; Eastman Kodak Co. v. Southern Photo Materials Co., 273 U. S. 359; 71 L. Ed. 684; Bigelow v. R.K.O. Pictures, 327 U. S. 251, 90 L. Ed. 652, 659, 660.)*

In making his proof of loss of net profits, plaintiff utilized two alternative methods of demonstrating this loss—one, a method based on the cost of the product at the closest alternate source, and the other based on actual costs and sales existent during the period in question. Let us identify the two approaches to this proof as "Kansas City cost" method and "cost on actual sales" method.

Kansas City Cost Method: As has heretofore been argued, (See pp. 23-27 of this brief), while the contract between the parties is immaterial to Plaintiff's right to recover under the Sherman Act, it is material as a source of evidence for establishing Plaintiff's damages. It evidences a present intention and disposition on the part of Defendant to sell to Plaintiff at a certain price for a given period of time, which intention and disposition would have prevailed but for the conspiracy in question. Fundamentally, what the Defendant Association did in this cause was to refuse to sell to Plaintiff under a sales contract, knowing he was planning on resale of the commodity. As a basis for determining whether or not Plaintiff was in fact damaged, we may look to the measure of damages for breach of such a sales contract and the proof

that is admissible as to the fact of damage arising from such breach.

In *78 Corpus Juris Secundum, Page 227, Sec. 543*, the following general statement of law appears:

> "Where the breach consists of the failure of seller to deliver the goods, the measure of damages is the loss directly and materially resulting in the ordinary course of events from the breach. Although it is stated that generally the measure of damages for such a breach is ordinarily the difference between the contract price and the market price or market value, this rule assumes the possibility of a purchase in the market, and applies where there is an available market."

See *National Dairymen's Ass'n v. Dean Milk Co., 183 Fed. 2d 349 (7th Cir., 1950).*

The above is the rule of damages in Texas cases where the damage flows from breach of an agreement to sell:

> "The all important factor in the ascertainment of damages is price. The purchaser's damages in a suit against a breaching seller would normally be measured by the difference between the contract price and the price at which he could obtain like goods from other sources. Damages are thus fixed by a price differential." *(Pace Corp. v. Jackson, S. Ct., Tex., 284 S. W. 2d 340, 347.)*

The above rule applies with equal force to goods that are to be manufactured by the seller. *(78 Corpus Juris Sec., Page 230, Sec. 544.)*

The corollary rule on mitigation of damages is that a buyer must supply himself from another market if he can do so at the contract price or lower, but a buyer is under no duty or obligation to supply himself with goods from

another available market unless he can do so at a price not exceeding the contract price. *Gilson v. F. S. Royster Guano Co., CCA 1 Fed. 2d 82 (3rd Cir., 1924).*

The evidence adduced at the trial of this case showed that upon the Defendant's refusal to proceed with the contract in question, Plaintiff undertook to find another source of supply from which he could purchase Class I milk, bottled in one-gallon glass containers. He detailed his efforts in this regard, and the evidence reflects a reasonable endeavor on his part, in the light of the then existing circumstances, to find another dependable, responsible market (R. 264-265). Bear in mind that under the record in this case, it was necessary for Plaintiff to find a source of supply which was dependable and financially responsible (R. 275) for on the basis of such source of supply Plaintiff hoped to establish a *distribution* business in Dallas, which would by its very nature require a dependable continuity of service and supply. Plaintiff carefully checked out the source that Woodman suggested, to-wit, a Mr. McLean in Greenville, Texas. Mr. McLean didn't offer him the same service, nor did he have a plant or equipment to do the job, nor was he approaching it (R. 264; 351-352). As the record reflects, he had a "plan but not a plant". A contact with Lamar Creamery was unsuccessful (R. 265). It certainly could not be expected of Plaintiff that he contact any of the local Ft. Worth-Dallas handlers who were the very conspirators who were attempting to keep him from entering business (R. 391). The only source of supply that Plaintiff was able to locate was the Meyer Sanitary Milk Company in Kansas City (R. 275), which actually quoted a figure to him of $2.70 cwt. over the

Kansas City Class 1 price of milk. However, the price at Kansas City was so high that it would not have been economically feasible for Plaintiff to proceed on the basis of this source of supply (R. 390). This was the only alternate supplier that Plaintiff could locate (R. 394), and in fact, is the only one shown by the evidence in this record to have existed at the time and on the occasion in question. Plaintiff feels that if Defendant had known of, or could have located, any other alternate source of supply it would have presented evidence of same in the trial of this cause. But it must be noted that Defendant's only effort in this regard was the presentation of Harmon Schepps—himself the president of one of the conspirators against Plaintiff—who testified that in 1958, two years after the date of the conspiracy, he started bottling in glass gallon jugs and would have done so earlier if Plaintiff had asked him to do so. The weight of this testimony was for the jury to determine.

Let us examine the evidence with reference to the "Kansas City cost" proof for a specific year, to-wit, 1958 (R. 294):

Plaintiff showed that the average cost of the product from the Kansas City source would have been 60.6 cents per gallon and that under the North Texas contract, the average cost per gallon would have been 49.2 cents, or a difference of 11.4 cents in the cost of the product. Using the actual gallonage sold for the year by Jere Dairy, Inc., 840,000, Plaintiff demonstrated a $96,000 loss on the basis of basic cost difference. Since Plaintiff's other expense item—his distribution cost of the product—would have been the

same under either source of supply, this difference in cost represents difference in net profits.

For the overall four-year period, Plaintiff's loss under the "Kansas City cost" method of proof was shown to be $437,000 (R. 296).

Plaintiff submits that under all the circumstances the Kansas City price was a proper price at which to fix the market value of the commodity which the Defendant had declined to deliver, and that evidence of such price was admissible as one manner of demonstrating clearly *the fact* of Plaintiff's damage as a result of the conspiracy. The fact that Plaintiff did not proceed to purchase from such alternate supplier is not controlling under the above cited authorities, the Plaintiff being under no obligation to purchase from such alternate supplier unless he could do so at the same or a lower price. Thus, Plaintiff urges that *the fact of damage in this case is clear: the market value of the commodity at the time of the breach was higher than the contract price.* Such being the case, Plaintiff suffered damage automatically on the occasion of Defendant's refusal to sell at the contract price.

"Cost on actual sales" method: Turning now to the other alternative method of proof as to damages suffered by Plaintiff, Plaintiff was in the fortuitous position in the trial of this cause of having actual performance figures on which to predicate his proof of (1) the amount of milk which he would have sold had he been permitted to go into business as he planned; (2) what his distribution costs would have been; and (3) the price at which he could have

sold such milk. This arose by virtue of the fact that Plaintiff had been employed for substantially the whole of the period by Jere Dairy, Inc., a private corporation of which he was a part owner. As has heretofore been pointed out, Jere Dairy, Inc. was a *combination* "processing and distributing" business, but from its operations during the period in question, Plaintiff was able to make accurate proof as to sales, distribution costs and sales prices. Since Plaintiff acted as the chief, and for that matter the only, directing agent of Jere Dairy, Inc., the sales performance figures of that corporation for the period in question afforded a reasonable and logical basis on which Plaintiff could base his claim as to what he personally would have sold and would have made, had he been permitted to go into a *pure distribution* business under his agreement with the Defendant.

Proceeding on this basis, and to show the exact dollar loss sustained by him, Plaintiff offered evidence as to the following facts:

(i) What the actual cost per gallon would have been to him under the Association contract;

(ii) What his distribution cost per gallon would have been. (These were average figures (by years) over the period in question, based on Jere Dairy's actual distributive cost experience, including administrative overhead.)

(iii) The prices at which such gallon actually sold over the period in question. (Based on actual and known sales prices.)

He was thus able to demonstrate—*on the basis of actual experience figures and not on guesswork or conjecture*—what profit he would have made per gallon if the Defendant association had been willing to sell to him and if he had not been the victim of the conspiracy in question.

For example, let us examine Plaintiff's proof for one year—1958 (R. 289-290):

First: On the basis of the actual Class I prices for the year 1958, Plaintiff showed what the average cost to him per gallon would have been, had he been able to purchase from the Defendant. This cost was taken from Market Administration records, and the accuracy of these figures was stipulated by Defendant. Rather than base his calculations on each change in the Class I prices that occurred during 1958, for purposes of convenience Plaintiff averaged all of such costs and computed his cost on the basis of the average Class I price for the year, plus $.60 cwt. as set by the contract. Thus, Plaintiff's net cost of the finished product, delivered to him in Dallas and ready for wholesale delivery to retailers, would have been 49.2 cents.

Second: Next, Plaintiff was able to show what the actual cost of distribution of a glass gallon of Class I milk was during the year 1958. Actual performance figures of Jere Dairy, Inc., based on its books and records, were the basis for this figure, and since such costs varied from month to month, an average cost was used for the entire year (See R. 285). Note also that this distribution cost was an overall figure, and repre-

sented a total distribution cost. This is shown to have been 4 cents.

Third: Next, Plaintiff was able to show—again on the basis of actual performance figures—the average price at which a glass gallon of milk sold to retailers during 1958. Here again, since the price fluctuated from month to month, an average figure was used to demonstrate the price for the year. Said price was 64.5 cents.

Fourth: Plaintiff was able to testify as to the actual number of glass gallons sold by him as an officer and employee of Jere Dairy, Inc. This was in the amount of 840,000 gallons. Since Plaintiff was the only sales agent of the corporation, what he was able to do in that capacity is clear evidence of what he would have been able to do as an individual.

From the above facts it is clear that by applying lost profit per gallon to the number of gallons actually sold, Plaintiff was able to demonstrate with extraordinary accuracy what his loss in net profit was for the year—$97,500. By the same method, and with the same accurate figures, Plaintiff demonstrated a lost profit of $425,000, for the four years, 1957 through 1960 (R. 292).

By way of interpolation here, and while it is not necessary to rely on the point, Plaintiff wishes to point out that the use of sales figures of Jere Dairy, Inc., was actually far more restrictive on Plaintiff than the Defendant was entitled to. That is, had Plaintiff been able to go into a purely distributive business and devote his entire time and

effort thereto, it is reasonable to expect, and the evidence shows, that he would have sold more gallons than he was able to when fulfilling the multiple responsibility of processing, bottling and distributing the product (R. 299). (*Pace Corp. v. Jackson, 284 S. W. 2d 348, 155 Tex. 179, S. Ct. Tex.; Beckin Company v. Gemex Corp., 272 F. 2d 1, cert. den.)*

In reply to Petitioner's argument as to the "prejudicial" nature of the Kansas City price proof, Respondent would point out that the demonstrated loss based on performance records ($425,000) was surprisingly close to the loss based on the Kansas City alternate source basis ($437,000). Obviously, if plaintiff could have turned to other sources and bought the same commodity for the same or a lower price, he would have suffered no damages. Thus, proof of the Kansas City price, together with other proof of unavailability of other alternate sources, was necessary to show the *fact* of plaintiff's damage. But even so, his loss based on historical data was only slightly less, and the evidence of the Kansas City bid price was clearly proper and under no circumstance could have been prejudicial.

Mitigation of damages: It is clear that in any action for damages the burden of proof is on the Defendant to demonstrate that Plaintiff in some manner could have mitigated the damages suffered by him. The following statement of the rule appears in *15 Am. Jur., P. 770, Sec. 331:*

> "In an action for damages the plaintiff has the burden of establishing the damages which resulted from the defendant's tortious action or his breach of a contract, but insofar as it may be contended the damages

> might and should have been minimized by taking steps to reduce the resulting damages or prevent the accrual of damages, the burden of proof rests upon the defendant."

In *Finberg Trading Company v. The Republic of China (220 F. 2d 844, 846, 5th Cir.)*, the court recognized the foregoing rule in the following language:

> "The burden of proving that damages should have been mitigated is on the party asserting it. Standard Growers' Exchange v. Hooks, 22 F. 2d 599; Campfield v. Sauer, 189 Fed. 576."

In addition to the foregoing authorities, numerous courts have uniformly held that the burden is on the defendant to plead and prove facts in mitigation of plaintiff's damages. [*Phelps v. Convellee, Tex. Com. App., 285 S. W. 1047, 1048, 1049, syl. 1 and 4; McDaniel Brothers v. Wilson, Tex. C. C. A., writ ref., 70 S. W. 2d 618, 624, syl. 20; 17 Tex. Jur. 2d 114, Sec. 36 (damage, mitigation, burden of proof)*].

The evidence shows that Plaintiff finally went into business in April of 1957, in the sense that he owned one-third of the capital stock of a new corporation and was employed by said company on a salary basis (later he acquired two-thirds of the capital stock thereof). Since Plaintiff thus made some financial gains during the period in which he otherwise would have been engaged in operating his own business under the source of supply afforded by the North Texas Producers' contract, it can be argued that such gain should be set off against the lost profit which Plaintiff demonstrably suffered. In this regard the evidence showed that Plaintiff at first made $500 per month salary, and

that later his salary was increased to $1,000 per month (R. 395). Further, that Jere Dairy, Inc. has had an increase in its net worth of approximately $4,000 and that Ola, Inc., a wholly owned marketing subsidiary, has earned approximately $12,000 since its existence (R. 399). (See Footnote.)

Let us give the foregoing "mitigation" evidence the construction most favorable to Defendant. That is, let us assume that Plaintiff earned $1,000 per month since the advent of Jere Dairy, Inc., and owned all of the capital stock therein since the first. Also, let us allow nothing to Plaintiff by way of return from his invested capital over the years. Through the date the case went to trial, Plaintiff would have then received by way of salary $46,000, and would have accumulated profits in his corporations totalling $16,000, or a total of $62,000 gained—*assuming every fact in a light most favorable to Defendant.* Off-setting such figure against Plaintiff's losses of $425,000 leaves Plaintiff net loser to the extent of $363,000. The foregoing is true even though the burden rested on Defendant, and not the Plaintiff, to prove that Plaintiff could have mitigated his damages.

(In connection with the foregoing evidence, Appellee wishes to point out an error in the record that is apparent from the face of the record. On page 397, on the lower portion of the page, the following answer of Plaintiff appears:

"A. In 1960, we show a figure of $79,212.13 more than we put in the corporation * * *."

From the next question and the answer to it, it is apparent that a semi-colon or a dash was omitted after the figures, and that accurately the answer should read as follows:

"A. In 1960 we show a figure of $79,212.13—more than we put in the corporation * * *."

It is apparent that what Plaintiff was testifying was that the $79,000 figure was "more" than the original $75,000 capitalization, and that it was not his meaning that there was $79,000 more than the amount of original capitalization.)

In the light of the foregoing, Plaintiff urges that the only question is not whether the jury's findings of $100,000 damages was supported by the evidence, but rather why the jury was so conservative in its finding.

In its brief, Petitioner makes great issue of Plaintiff's inability to testify accurately as to the cost of Jere Dairy, Inc. to bottle a glass gallon of milk. It is difficult for Respondent to see how this evidence would have been relevant at all. The issue of damages was how much Plaintiff lost by reason of the conspiracy to keep him out of the distributing business, not a combination bottling and distributing business. The answer is that he lost the profits that he would have made less the profits that he did in fact make. Whether Jere Dairy, Inc.'s bottling costs were high or low would not shed light on this issue in any manner. What Plaintiff demonstrated was loss in net profits, just as Petitioner has always insisted should be the rule.

Respondent wishes to emphasize that this cause was extensively pre-tried and that full use was made by both sides of available discovery procedures (R. 94-109). The accuracy of the various base figures and calculations appearing on the exhibits to Plaintiff's complaint were stipulated by the parties (R. 101). Copies of Jere Dairy's balance sheets were furnished to Defendant (R. 395), and Defendant had the opportunity of extensive examination of Keith Young in deposition prior to trial of this cause. It is urged that had Defendant had any doubt as to the factual basis of the financial data utilized by Plaintiff in making its proof of

damages, Defendant had full and plenary opportunity to refute such data if it had been possible.

Respondent submits that this case affords an instance of unusually reliable evidence of damages in an anti-trust case. Witness the following evidence which was offered in this cause: the accuracy of certain base cost figures was stipulated by the Defendant (R. 101); the market value of the commodity from the closest responsible alternate source known to Plaintiff was established by direct evidence of the party making the price quotation to Plaintiff (R. 308); Plaintiff's testimony as to the wholesale selling price of the product during the entire period in question, the number of gallons actually sold, and the costs of wholesale distribution were taken from Department of Agriculture records (R. 285) and the actual books and records of Jere Dairy, Inc. (R. 284) and represented accurate performance figures during the period in question. Witness the following testimony of Plaintiff:

> "Q. What are the facts with reference to whether or not you have been in direct supervision of the dis ..ou-tion of your product after the milk is bottled in one gallong glass containers?
>
> * * * * *
>
> "(By Mr. Collie):
>
> "Q. Your answer is yes?
>
> "A. Yes.
>
> "Q. In the performance of this function, Mr. Young, has it been necessary for you to ascertain what it cost you to distribute the milk to the retail stores than handle it?
>
> "A. Yes, sir.

"Q. Now, I will ask you if, from your books and records and business records of Jere Dairy, Incorporated, if you have been able to compute an average cost of distribution of a glass gallon of milk?

"A. Yes, sir.

"Q. You have heretofore made these calculations, is that right.

"A. Yes, sir.

"Q. And you had them reproduced on a piece of paper?

"A. Yes, sir" (R. 284-285).

In its Statement of Point II (Petitioner's Brief, page 3) and in its Argument thereunder (Petitioner's Brief, page 10) Petitioner states that plaintiff claimed as damages the difference between contract cost and actual bottling cost (meaning actual bottling cost of Jere Dairy, Inc., of which plaintiff became part owner after the conspiracy). This is not an accurate statement of plaintiff's position, and this statement is nothing but an attempt to confuse the issue on the real basis of damage proof in this case. Plaintiff's proof of damages was as to his loss in net profits occasioned by the conspiracy, with such loss being mitigated by his actual gains as realized from the part ownership of Jere Dairy, Inc., during the period in question. Throughout this case—up until the filing of its Petition for Certiorari herein—Petitioner has insisted that loss in net profits was the proper measure of damages to be applied, and this is exactly what the plaintiff proved and what the court charged the jury. (R. Vol. II, pp. 693-4.)

VI. The amount of damages resulting from the conspiracy is not affected by Petitioner's option to cancel the contract on six months written notice.

Petitioner's basic contention in this connection is that since the contract was subject to cancellation at the option of either party upon six months notice, it is improper to award damages for more than such period. *This is but another way of saying that since the contract was enforceable at the behest of Plaintiff for only six months, his damages should be limited to that period. Such reasoning is nothing but a piecemeal assertion of the demonstrably erroneous contention that there can be no recovery under the Sherman Act unless there is an enforceable contract.* Such is clearly not the law.

The opinion of the court in *Johnson v. Joseph Schlitz Brewing Company (33 Fed. Supp. 176, aff. 123 Fed. 2d 1016)*, clearly establishes the proper rule with reference to the enforceability of a contract as a prerequisite to a Sherman Act violation. In that case, the evidence indicated a possible illegality of the agreement in question because of a violation of state and federal law with reference to ownership of retail equipment by a brewer. Also, the defendant contended that plaintiff failed to prove a valid and enforceable contract because it violated the Statute of Frauds. In passing upon these contentions, the court said:

> "Defendant invokes the well-defined rule that parties to an illegal agreement will not be aided by the courts. Plaintiff contends that there was no illegal agreement. Assuming without deciding that the alleged agreement was illegal, it is clear that plaintiff does not sue upon any such agreement but upon defendant's alleged vio-

lation of the Sherman Act, and plaintiff's damage was occasioned by such alleged violation of the act, rather than by any violation of the 'agreement'. Therefore, the 'agreement' cannot be used to defeat plaintiff's right of action based upon the overriding statutory policy of the Sherman Act, if that right of recovery is otherwise clear * * *.

"Defendant next contends that plaintiff failed to prove a valid and enforceable contract between plaintiff and defendant. Here defendant again confuses this first cause of action under the Sherman Act with a suit on a contract. Once an illegal conspiracy in violation of the Sherman Act is shown, all the plaintiff need do is to show his damages * * * For the same reason defendant's claim that the contract between it and plaintiff violated the Statute of Frauds (Section 121.04 of Wisconsin Statutes, Section 7197 of Williams' Tennessee Code), is immaterial as to plaintiff's recovery under the Sherman Act * * *."

In *Steiner v. Twentieth Century Fox Film Corporation (232 F. 2d 190, 9th Cir.)*, the court unequivocally states:

"* * * the case at bar is a tort action, based upon the anti-trust laws. As such there is no need for any contract obligation, only that a violation of the anti-trust laws be alleged."

And we again call the Court's attention to the language of Judge Learned Hand in *Vines v. General Outdoor Advertising Company (171 F. 2d 487, 2nd Cir.)*:

"* * * The Anti-Trust Acts give a right of action to 'any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws'; and it has been repeatedly held that those are within this language who have been so injured *though they have no contract* with the wrongdoer, but only an expectation of future dealings with him. * * * *In the*

case at bar the wrong had nothing to do with any contract between the parties; it would have made no difference if there had been no contract of any kind between them." (Emphasis supplied.)

It goes without saying that if no enforceable contract at all is a requirement, then the fact that a contract may not be enforceable upon six months notice is also no defense

There is not a shred of evidence in the record that Defendant undertook to rely on or utilize the six months cancellation clause of the contract. Woodman testified in deposition concerning this as follows:

"Q. In other words, if I understand your testimony then, the Producers has never invoked its right to cancel this contract by giving the other party six months advance notice of the cancellation; is that correct sir?

"A. There was no written notice as far as I know.

"Q. Six months written notice of cancellation, is that right, sir?

"A. That is right.

"Q. This particular phrase or provision of the contract then providing for six months written notice in advance of cancellation has never been exercised by the North Texas Producers Assn., to your knowledge?

"A. We have never written him any notice of cancellation, that is right" (R. 428).

* * * * * *

"Q. You also didn't exercise any six months cancellation under the last sentence of that contract?

"A. No, we did not" (R. 429).

The $2,000 cash deposit paid by plaintiff to defendant under the terms of the contract was never refunded to plain-

tiff until 30 days before the case went to trial before a jury (R. 217, 218).

Defendant's contentions with reference to the six month cancellation clause lead us again to a basic inquiry in this case: Was Defendant's refusal to sell referrable to the conspiracy, or something else? There is nothing in the record to show that Defendant's refusal was referrable, after the first six months, to the clause giving Defendant an option to cancel. As has been pointed out, Defendant should be presumed to have wanted to sell as much milk as possible at the highest price obtainable, and no indication exists in the record that this presumption would not have obtained from the outset of the contract up until the date of trial.

Although, as above shown, Defendant never has exercised its option to cancel the contract under the six-months clause, it is clear in the light of the authorities already cited that even if Defendant had exercised the option, Plaintiff's recovery would not have been limited to his loss of profits during the six-months period. Of course the Defendant, acting individually, would have had the right to cancel the contract and refuse to sell bottled milk to Plaintiff, but it did not have the right to conspire with others to refuse to sell to Plaintiff. Thus, if Defendant had begun performance under the contract, and then had been induced to exercise the option by a conspiracy such as that shown here, Plaintiff would have been entitled to recover his damages resulting from the illegal conspiracy on proof of facts indicating that in the

absence of the conspiracy the option would probably not have been exercised, even though he would have had no cause of action for breach of contract.

Since the present case is not an action for breach of the contract, but a suit in tort for damages resulting from the illegal conspiracy, Defendant's option to terminate is not material if there is evidence to support the jury's conclusion that the option probably would *not* have been exercised in the absence of the conspiracy. The evidence shows that Defendant made a substantial investment in equipment and supplies required for performance of the contract, and that the contract was advantageous to Defendant in that it enabled Defendant to sell its surplus milk at class 1 prices rather than at substantially lower class 2 prices. Except for the illegal conspiracy found by the jury, there is no evidence in this record of any fact or circumstance that would have made it advantageous to Defendant to cancel the contract at the end of six months. Consequently, the evidence fully supports Plaintiffs recovery of damages beyond the six months period.

The long list of authorities cited by Petitioner on page 14 of its brief are obviously authority only for the measure of damages in a breach of contract suit. Such a suit is an assertion of a legal obligation arising by virtue of a contract. The instant case is not an assertion of such rights, but rather is a tort action for damages, and we again call the Court's attention to the authorities cited on pages 23 through 27 of

this brief, holding that a suit for treble damages under the Anti-trust laws is a suit sounding in tort and not in contract, and that recovery under the Sherman Act is not dependent upon the enforceability of a contract.

On page 14 of its brief. Petitioner has cited *Alexander v. Texas Company* as authority for the proposition that damages cannot be awarded for a longer period than the contract is otherwise enforceable. While the quoted portion of the court's opinion might at first blush seem to support Petitioner's contention, a more careful reading thereof reveals that such is not the case. At *149 Fed. Supp., page 43*, the court carefully notes as follows:

> "Plaintiff makes no allegation that the lease cancellation was directly or indirectly involved in the alleged conspiracy between defendant and the twelve favored Texaco dealers. Indeed, he alleges nothing in this respect from which a reasonable conclusion could be drawn that defendant violated any of the anti-trust laws."

It would thus appear that the portion of the court's opinion quoted by Petitioner only means that since the plaintiff had not alleged that the lease cancellation was involved in the conspiracy, the plaintiff had simply not alleged any damage flowing from the conspiracy. This of course is not true in the instant case, where Plaintiff has alleged and proved that Defendant's refusal to sell was due to the conspiracy in question.

If by chance the opinion of the court in the *Alexander* case could be construed as requiring an otherwise enforceable

obligation on the part of the conspiring defendant, this district court opinion would appear to be at complete variance with other established authority concerning the point. *(Johnson v. Joseph Schlitz Brewing Co., 33 Fed. Supp. 176, 179; aff. 123 F. 2d 1010; Gamco, Inc. v. Providence Fruit and Produce Bldg., Inc., 194 F. 2d 484, 487, 1st circ.; Vines v. General Outdoor Advertising Company, 171 F. 2d 487, 2nd circ.; Steiner v. Twentieth Century Fox Film Corporation, 232 F. 2d 190, 9th circ.)* As was noted by the court in *Johnson v. Joseph Schlitz Brewing Company* (supra), the question of the enforceability of a contract under the Statutes of Fraud was immaterial as to plaintiff's recovery under the Sherman Act, as was the question of the contract's enforceability under other state and federal statutes. That court correctly notes that a cause of action under the Sherman Act should not be confused with a suit on a contract.

The same point is involved in *Gamco, Inc. v. Providence Fruit and Produce Building*, supra. There it was clear that there was no legal obligation on the part of the defendant to let the premises to plaintiff, since all the defendant had done was refuse to renew a lease; the defendant even insisting that its very refusal was justified under an express term of the lease agreement. Yet the court in the *Gamco* case reversed and permitted recovery, and in so doing recognized the very principle here argued, to-wit, that if the defendant's refusal to deal is the result of a forbidden conspiracy, such refusal is actionable regardless of whether there is an enforceable contract to deal or not.

It is thus immateral whether the contract in this case was enforceable for one day, or for six months, or at all. On the basis of the evidence submitted to it, the jury has found that Plaintiff's damages were caused by the conspiratorial refusal of the Defendant to sell, and, such fact having been established, all that remained was for the Plaintiff to show his damages.

CONCLUSION

The conspiracy shown by this record is precisely the kind of evil which the Sherman and Clayton Acts were designed to prevent. The evidence shows that milk distributors in the Dallas-Ft. Worth market were selling milk in paper cartons at 96 cents per gallon. They were strongly opposed to the entry into that market of any competitor who would sell milk in glass gallon bottles because that type of competition would reduce the price and bring down their profit. Keith Young appeared on the scene and proposed to do just that. He made a contract with Defendant, the major supplier of all the distributors in the area, which would have enabled him to provide the Dallas-Ft. Worth market with milk in gallon bottles at substantially lower prices. To forestall this threat, the conspiracy in question resulted.

The very purpose of the Anti-Trust Laws is to prevent enterprises from being forced out of the market by combinations and conspiracies in restraint of trade. The conspiracy

in question did, in fact, restrain trade by preventing Defendant from selling to Plaintiff milk bottled in one-gallon glass containers. Plaintiff was unable to obtain such bottled product from any other source at less than prohibitive prices. To his everlasting credit, he did not accept this illegal interference as final defeat. He organized a corporation, raised additional capital of his own, brought other investors into the enterprise, purchased processing and bottling equipment, and undertook to supply the public demand which he had so clearly foreseen. The amount of milk he could have sold under the contract is thus not left in the realm of speculation, but is established by his actual experience as manager of Jere Dairy, Inc. Since the selling price of such milk and the distribution costs are also established by experience, and the costs of the bottled milk under the contract are established by the contract, the amount of profits lost are fixed with extraordinary definiteness and certainty. In fact, the amount of such loss of profits is definitely shown to be conservative because Plaintiff was unable to devote his full time to the distribution business. Admittedly he made some profits on the combined processing, bottling, and distribution business but such profits are shown to be far less than those he would have realized under the contract. Consequently, far from being speculative and excessive, the jury's award of $100,000 for loss of profits appears to be substantially less than the actual loss which the evidence definitely shows.

After a careful and detailed analysis of the record, the United States Court of Appeals for the Fifth Circuit concluded as follows:

> "* * * we are persuaded that the conclusions reached by the jury are just and proper. The record in this case clearly demonstrates that there has been a violation of the federal antitrust laws in a positive, direct and flagrant manner. By combination and conspiracy, the milk handlers and distributors together with North Texas combined to stop Keith Young from entering the milk business in the market area involved and they accomplished what they set out to do. Their conduct was restraint of trade and they did monopolize. The public was injured in a real and vital sense because the price of milk was maintained at the level which the conspirators decided to maintain it. Competition was stifled and eliminated. North Texas gained its reward for its action by receiving an increase in the price it was receiving for the product it sold. Keith Young was damaged because he lost a contract—destroyed by combination and conspiracy; and he lost the opportunity to procede with the contract according to its terms. The competition he could have provided with the prices and gallon containers which North Texas agreed to supply was eliminated."

The public policy of this country, as declared in the antitrust statutes, is to promote private enterprise by encouraging people like Keith Young to go into business, supplying the public demand for more efficient and less costly production and distribution of goods and services, and by prohibiting people like the North Texas Producers Association from entering into conspiracies to keep people like Keith Young out of such business. In order to make that policy effective, definite penalties are provided for violation, and if ever

there was a case where such penalties are appropriate, this is such a case.

WHEREFORE, PREMISES CONSIDERED, Respondent, Keith Young, prays that writ of certiorari in this cause be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that copies of the above and foregoing Reply to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit and brief in support thereof have this date been served upon counsel for Petitioner by depositing same in the United States mail, with sufficient postage affixed, addressed as follows:

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Dallas, Texas, this 6 day of February, 1963.

Leon Jaworski